Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

GARY W. BOWEN,

Petitioner,

v.

KEITH OISTEAD; UNITED STATES OF AMERICA; HUGH L. COX III; DAN E. DENNIS; KENNETH M. TAYLOR; STATE OF ALASKA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where the Constitution of the United States specifically reserves to the states the power to govern the militia, where Congress has specifically acted to confirm that the states have control over the appointment of officers and the termination of officer appointments in the National Guard (militia), where this court has confirmed that the National Guard (militia) has, at any one time, only one status (either State or federal), and where the states exercise exclusive power of appointment and termination of appointments of officers in the National Guard (militia), can the federal courts prohibit the states from providing remedies to militia officers who are wrongfully terminated?

2. Where the military or the militia employ professionals (i.e. doctors, lawyers, etc.) on a career basis, based on professional certification, not military expertise, and where the purpose of their employment is based on their private professional skills and the public necessity of assuring compliance with the law, not military expertise, is the assessment of a professional officer's professional qualifications and suitablity an "inherently military decision" and thus exempt from judicial review?

3. Given Congress' express recognition of exclusive state control over the the appointment and termination of officers in the National Guard (militia), does the *Feres Doctrine* preclude contractual claims in state court to enforce the terms of a written contract between the state and an individual member of the state militia, merely because the contract related to service in the state militia?

QUESTIONS PRESENTED – Continued

4. If Bowen was a member of the armed forces of the United States for purposes of *Feres,* can he be deprived of the protections afforded all other active duty and reserve officers of the armed forces of the United States without violating his rights to due process and equal protection; and is compliance with the applicable regulations subject to court review?

PARTIES

The parties are Petitioner/Plaintiff, Gary W. Bowen, and Respondents/Defendants Keith Oistead, United States of America[1], Hugh L. Cox, III, Dan E. Dennis, Kenneth M. Taylor, and the State of Alaska.

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[1] Although Bowen's complaint alleges that those defendants who were members of the United States Armed Forces were acting outside the course and scope of their military duties, the United States Attorney for Alaska certified, pursuant to 28 U.S.C. 2679(d)(1), that they were acting within the course and scope of their military duties. Bowen denies this. It is far from clear how Air Force Officers could properly be involved in state personnel proceedings. It is equally unclear how a federal civilian employee, acting as a member of the militia, was "officially" involved in state personnel decisions in a federal capacity. The lack of a trial precluded examining offered evidence on this point and there is a conflict in the evidence concerning these conclusions. The United States was, however, substituted for the individual Defendants Gillean, King, Williams, Pearson, and Gamboa. Bowen has never conceded that these individuals are entitled to the protections of the Federal Employees Liability Reform and Tort Compensation Act of 1988 or that the declaration of the United States Attorney is correct concerning their entitlement. It is Bowen's contention that these individuals were acting outside the course and scope of their official duties and that the United States would be divested of jurisdiction if an evidentiary hearing were held on this issue.

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OPINIONS

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in *Bowen v. Oistead, et al.*, 125 F.3d 800 (9th Cir. 1997). A copy of the slip opinion is annexed hereto as Appendix A ("App. A").

The order of the Ninth Circuit Court of Appeal denying rehearing is attached hereto as Appendix B ("App. B")

The opinion of the Federal District Court for the State of Alaska is annexed hereto as Appendix C ("App. C").

The opinion of the Supreme Court of Alaska in *State of Alaska, Department of Military and Veterans Affairs, Alaska National Guard v. Gary W. Bowen,* was decided February 13, 1998, and will appear in the Pacific Reporter. Citation is not yet available. A copy of the opinion is annexed hereto as Appendix D (App. "D").

JURISDICTION

The opinion of the court of appeals was filed on September 12, 1997. A timely petition for rehearing was denied by order filed January 22, 1998. A copy of the order is annexed hereto as Appendix B ("App. B"). The original action was filed in the Alaska Superior Court. Alaska Superior Court Case No. 3AN-95-4398 Civil. The District Court's jurisdiction was created pursuant to certification of the United States Attorney for the State of Alaska pursuant to 28 U.S.C. §§1446(a) and 2679(d)(1).

The Petitioner disputes the correctness of the U.S. Attorney's certification, and therefore the jurisdiction of the District Court. Bowen has always contended that this is a state matter. The case was nevertheless removed to the District Court pursuant to 28 U.S.C. §1446(a). Jurisdiction of this court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL, STATUTORY AND REGULATORY LAW

FEDERAL

U.S. Constitution Article 1 Section 8; U.S. Constitution Amendment 5; U.S. Constitution Amendment 11; 10 United States Code §801 et seq.; 10 United States Code §802; 10 United States Code §8379; 10 United States Code §10110; 10 United States Code §10113; 10 United States Code §12401; 10 United States Code §12403; 10 United States Code §12405; 10 United States Code §12682; 10 United States Code §12683; 10 United States Code §14902; 10 United States Code §14903; 10 United States Code §14904; 28 United States Code §1254; 28 United States Code §1367; 28 United States Code §1446(a); 28 United States Code §1346(b); 28 United States Code §1367.28; 28 United States Code §2671; 28 United States Code §2679(d)(1); 32 United States Code §101(12); 32 United States Code §101(19); 32 United States Code §324(b); 32 United States Code §3040; Defense Authorization Act of 1994, P.L. 103-337; 32 Code of Federal Regulations 564.52(b); FRPC Rule 12(b)(6); Air Force Regulation 30-30; Air Force Regulation 36-14; Air Force Regulation 36-016; Alaska Statutes 26.05.030; Alaska Statutes 26.05.060; Alaska Statutes 26.05.070; Alaska Statutes 26.05.200; Alaska Statutes 26.05.300; Air National Guard Regulation

110-6; Air National Guard Regulation 35-03 §6-5(a); Air National Guard Regulation 35-03 §6-5(c); Air National Guard Regulation 35-03 §6-10(d); Air National Guard Regulation 36-016.

STATEMENT OF THE CASE

The Petitioner, Gary W. Bowen, was wrongfully terminated by the State of Alaska Department of Military and Veteran's Affairs (DMVA) from his employment as the legal advisor to the Alaska National Guard.[1] App. D. Bowen had been appointed by the Governor of Alaska to serve as the Staff Judge Advocate of the Alaska National Guard (state militia). The position of Staff Judge Advocate was created by state law. AS 26.05.300 *et seq.* Funding for this position was provided pursuant to Full Time National Guard Duty program,[2] which in essence provided

[1] For purposes of clarity, the state National Guard will be referred to herein primarily by its constitutional title, "militia" in order to avoid confusion with the National Guard of the United States, which is the militia called into federal service. The generic use of the term "National Guard" for both state and federal status appears to have contributed to erroneous concepts like simultaneous dual status or "A National Guard member is on active duty when called to service by the United States, and is on reserve duty when acting as a member of the state's National Guard". Opinion of the Ninth Circuit at 11946. *cf.* 32 U.S.C. §101(12). This dual status argument was disapproved in *Perpich v. U.S.* but has been revived by various courts of appeal, including the Ninth Circuit here.

[2] There are actually four separate programs which are sometimes collectively but erroneously referred to as "The Active Guard/Reserve Program"; the Full-Time Air National Guard program, the Full-Time Army National Guard program,

funding to the state to hire state employees in certain critical areas. Bowen was employed by the state on a contract basis and had been so employed for approximately 10 years. The contract was last renewed by the State of Alaska in June, 1991 and was for the express term of five (5) years.[3]

By regulation, Bowen's contract could only be terminated, involuntarily, for: 1) "acts of misconduct . . . "; 2) "moral or professional dereliction"; 3) loss of professional qualification; 4) substandard duty performance; 5) racism, sexism, or prejudice; 6) failure to maintain medical/physical standards. ANGR 35-03. Par. 6-5(c). None of these terms is defined in the regulation. None of these criteria suggest that the participant may be terminated due to a loss of confidence or a bad relationship. 1ER166. The alleged basis for termination was:

> 1. That Bowen had failed to adequately respond to an inquiry into alleged financial irregularity.[4]

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the Active Air Force Reserve program and Active Army Reserve program.

[3] The record reflects that the governor's order provided that Bowen was appointed as the legal advisor for a period of 5 years "unless sooner relieved by competent authority". The concept of being "relieved" is not the same as being "terminated". Had Bowen been ordered to federal duty, for example, he would have been "relieved" of state duty. The reverse would have occurred at the end of the federal service. Thus, the governor's order provided that Bowen could be reassigned by competent authority. It did not permit termination of the contract except as provided by state law.

[4] In 1992, Bowen was subject to a routine review of his security clearance. During the investigation, Bowen's "Top

2. That Bowen had failed to obtain a leave control number for an approved leave.[5]

3. That Bowen failed to work on the "Military Justice Project".[6]

Secret" clearance was temporarily suspended pending investigation of entries in Bowen's credit report. The entry concerned a disputed credit card charge(s). 1 ER 153 (Excerpt of Record). The issue was resolved in Bowen's favor and the "Top Secret" clearance was reinstated. Although the militia had no involvement in the clearance process, Gillean, in violation of AFR 30-30 and Bowen's right to privacy, directed Bowen to provide him with the specifics so that he, personally, could decide whether or not Bowen should pay the debt. Gillean did not complain that Bowen did not cooperate with the security agency, it is that Bowen would not disclose the specifics of his personal finances to Gillean. 1 ER 155. Had Gillean been entitled to this information, he could have gotten it through official channels. That he was not so entitled is reflected in 1 ER 155 para. 2 indicating disclosure was permitted only to the AG and the Commander.

[5] Bowen took approved Christmas leave. So did the leave clerk. It was customary for the leave clerk to complete the paperwork when he/she returned from leave. The record reflects that Bowen was reprimanded for violating an informal "policy", not the rule which required his supervisor to obtain the control number. 1 ER 164. By regulation, the control number could not be obtained by the person taking leave.

[6] If examined, the record would show that Bowen oversaw preparation of the state military justice system in 1991. This was a state matter. 10 U.S.C. §802. A.S. §26.05.300 *et seq.* Gillean intercepted the proposed regulation before it reached the governor's office and attempted to modify it, by whiting out portions that might have applied to him. His attempt at modification was frustrated when his actions were discovered and the regulation was implemented without change. The state military justice system was implemented by order of the governor on 31 March, 1992. In an attempt to delay

The ultimate question was, are these allegations true, and if so, do they justify termination of Bowen's contract of employment? Officers in all branches of the armed forces of the United States, both active and reserve, have the right to a pretermination hearing. See e.g. AFR 36-016. By regulation militia officers were also entitled to a hearing. ANGR 36-016 Termination of militia offers is a matter of state law. 32 U.S.C. §324(b). Alaska state law required a pretermination hearing as a prerequisite for termination of a state employee based on "misconduct". App. D. Bowen requested a hearing and asked the National Guard Bureau, DoD, to intervene. DoD replied that Bowen's termination was exclusively a state matter, and that federal law did not permit the military to interfere. 2 ER 540. App. E. Gillean and other respondents refused Bowen's request. Bowen was, instead, summarily terminated by state militia authorities on Gillean's recommendation.

Those sitting in judgement of Bowen were not impartial triers of fact. Gillean and his superiors had decided what they wanted to do prior to Gillean's recommendation. 1 ER 155. If reviewed, available evidence would also show that some of the militia respondents had private

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implementation, Gillean assigned Bowen to prepare a further "plan of action" without any direction concerning what was expected. Since the system was in effect, the assignment of a plan of action was odd at best. When Bowen attempted to obtain direction, he was told, in effect, to "figure it out". When he submitted the project, it was rejected without citing the specifics of the rejection. It was simply "unacceptable". It is noteworthy that Gillean, who initiated the action, did not include this as a basis for termination in his recommendation. 1 ER 166.

business relationships and obvious conflicts of interest. For example, respondent Dennis, in his civilian capacity, was respondent Gillean's attorney, and partner in a fishing boat. In the militia, Dennis was Taylor's commander.

Because the termination decision was a state action, Bowen sought review in the Alaska Superior Court alleging that he had been improperly terminated. The superior court agreed, found that Bowen was entitled to a pretermination hearing if he was to be discharged for "misconduct", reversed the termination decision, and sent the case back to the DMVA. The State appealed. The Alaska Supreme Court affirmed. App. D.

While the Alaska appeal was pending, and in order to preserve the statute of limitations on his remedial claims, Bowen brought an action in the Superior Court for the State of Alaska against the State of Alaska for damages for breach of contract, and against certain named individual defendants for damages on various tort theories. Bowen did not sue the United States, nor did he assert any federal entitlement or any federal basis for relief.[7]

None of the Judge Advocate officers of the United States Air Force, were assigned to the Alaska National Guard, the State of Alaska, or the National Guard Bureau of the Department of Defense and their assistance was

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[7] Bowen's constitutional claims were based on the Constitution of the State of Alaska. Bowen's tort claims against the State of Alaska and the individual members of the Alaska militia are supported by *Maryland, for the Use of Levin, et al. v. United States, supra, Emsley v. Army National Guard, supra,* and *Ables v. State of California, supra.*

obtained after the National Guard Bureau had advised the state that no federal assistance would be forthcoming. App. E, 32 U.S.C. §3040. One defendant was a civilian employee of the federal government whose federal duties did not involve supervising Bowen. Bowen's complaint alleged that these defendants were acting outside the course and scope of their military or federal duties in committing the tort(s) attributed to them. The U. S. Attorney for the State of Alaska caused the case to be removed to the Federal District Court on his certification, based on information then known to him, provided by the Defendants that the federal military officers and the federal civilian employees were acting within the course and scope of their federal military duties[8]. Bowen moved to disqualify the Department of Justice. 1 ER 353.

At no time did the court acquire jurisdiction over the action against the state. Such jurisdiction is precluded by the Eleventh Amendment.

On motion, prior to Respondent's answering, and without converting the motion to a motion for summary judgment, the District Court pursuant to FRCP Rule 12(b)(6) dismissed the entire case on the basis of *Feres v. United States*, (1950) 340 U.S. 135, 95 L.Ed. 152, 71 S.Ct.

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[8] The evidence would show that the Respondents, like Bowen, sought the assistance of the National Guard Bureau at DoD and that, like Bowen, they were advised that Bowen's termination was exclusively a matter of State law. There is no evidence that the military officers in question were authorized, or legally could be authorized to participate in or interfere with a state function. Bowen asserts that the evidence would show that their participation was neither properly authorized nor legal.

153, finding Bowen's claims nonjusticiable. The Ninth Circuit affirmed.

The Evidence: Extensive documentation was filed by Bowen and is contained in the Excerpt of Record ("ER"). One of Bowen's complaints is that the procedure utilized deprived him of the opportunity to present evidence and examine witnesses under oath. The Ninth Circuit relied exclusively on Bowen's status as a member of the National Guard. Opinion at 11953, App. 9. All of the courts have found, and Petitioner agrees, that Bowen was, at all relevant times, an employee of the State of Alaska. He was supervised, at all relevant times, by other employees of the State of Alaska. He is a licensed attorney, hired as an attorney. He was terminated by officials of the State of Alaska. Bowen was terminated without being provided a required pretermination hearing to determine whether the allegations of "misconduct" were true. The case was dismissed on motion prior to discovery, prior to answers, virtually without evidence.

Damages: The damages Bowen suffered were and remain severe. 1 ER 72-76. The Alaska Supreme Court confirmed that Bowen's liberty interests were impaired and did not reach the property interest issue. More than 16 years of his practice was government related but because he had been terminated for "misconduct", Bowen was unable to find work in Alaska or in the government sector. Had he been allowed to complete the contract then in effect, his retirement based on active service would have vested for all practical purposes. ANGR 35-03 §6-10(d). Had he been allowed to use his accrued leave, Bowen would have qualified for these benefits, based on

part-time service, at age 65. The Respondents, by violating the applicable regulations, prevented Bowen qualifying in either category.

Issues: The issues in this case require a determination of the status of all the parties, a determination of their authority to act, and the amount of due process necessary to protect liberty and property interests of the Petitioner. Within that framework,[9] Bowen asks: 1) By what authority does the District Court prohibit state proceedings between the State of Alaska and one of its employees? 2) By what authority do the alleged federal parties become officially involved in state proceedings? 3) Can an attorney be wrongfully terminated as a matter of

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[9] After Bowen's discharge, Congress enacted Defense Officer Personnel Management Act (DOPMA) as part of the Defense Authorization Act of 1994, P.L. 103-337, which now requires for reserve officers virtually all of the substantive and procedural due process rights requested by Bowen as a prerequisite to termination. See 10 U.S.C. §§14902, 14903, 14904, 12683. 10 U.S.C. §12682 expressly prohibits involuntary separation without a hearing of officers with more than 5 years of service. Bowen had over three times that minimum. Virtually all of these safeguards were prescribed by regulation and in practice as DoD policy at the time Bowen was terminated. This assumes, of course, that Bowen was a federal "Reserve" Officer as the Ninth Circuit found, not a State officer as the Alaska Supreme Court found. He was entitled to a pre termination hearing on the merits in either case. The essence of this case is that the Alaska militia leadership denied Bowen the rights of a reserve officer because of his state status, at the same time denying his rights as a state officer because he was in a "federal" program. The Alaska leadership was assisted by Air Force legal personnel even though such assistance had been officially refused and they had been referred to the Alaska Attorney General for assistance. (App. E).

military discretion, at the expense of his liberty and property interests? 4) When a militia regulation specifically provides that an officer's employment can be terminated only for specified causes, are the courts precluded from enforcing the regulation?

WHY THE PETITION SHOULD BE GRANTED

This case presents an ideal opportunity to clarify the application of the *Feres Doctrine* and the relationship between the militia, the military and between professional soldiers and members of the Uniformed Professions who practice in the military.

The law concerning the rights of members of the militia is not a mystery for the states. They govern the militia pursuant to their sovereign powers. It is not a mystery for the DoD. DoD expressly leaves it to the states. It is not a mystery to Congress. Congress leaves the appointment and termination of officers to the states. It leaves disciplining the militia to the states. Unfortunately, interference by the federal courts in the constitutional and statutory scheme leaving these matters to the states has the effect of making the law confusing, unworkable and unjust. If *Feres* prevents double recovery by the U.S. serviceman, it is being used to deny any recovery by the state militiaman. If the *Feres Doctrine* is not limited to the federal government, then it should be abolished as infringing on the powers granted to the states and as an impediment to justice.

If Feres is to be applied to the professions in the military, they deserve a special status distinct from the

professional soldier. A uniformed lawyer is not retained for his combat skills, but for his legal skills. His work is not "inherently military", but inherently legal. His duty is to represent his client, which may include representing soldiers against the command structure, or representing the people against abuses of power. He is required to counsel against unlawful conduct, and to report violations of law. The government lawyer is not a rubber stamp assigned to provide plausible deniability when the rules are deliberately broken. The Rules of Ethics should supercede command control. The records in this case provide ample evidence of the role of the legal officer as an advisor. It also demonstrates command disregard of advice it didn't like. For example, the Alaska command structure fired their lawyer over his objection. Even under fire, Bowen did not deny that he could be properly fired if the facts justified it. He merely demanded that it be done properly and in accordance with state law. The Alaska Supreme Court has confirmed that his was the more sound advice. The Alaska National Guard leadership asked the Departments of the Army and Air Force, through proper channels for legal help, and were both refused and referred to the state attorney general. App. E-61 thru 63. No explanation is offered concerning the lack of involvement of the Alaska Attorney General or of the part-time judge advocates belonging to the Guard. Instead, the evidence is uncontroverted that members of the Air Force Judge Advocate Generals Corp., outside of official channels and contrary to the response of the joint National Guard Bureau Judge Advocate, intervened in a

matter that belonged exclusively to the State of Alaska. A ruling that a lawyer's function is inherently military simply should not be made, given the ethical requirements of the profession, but if made should be affirmed directly by the Supreme Court.

I.

THE DISTRICT COURT AND THE COURT OF APPEALS LACKED JURISDICTION OVER CLAIMS AGAINST THE STATE OF ALASKA AND ITS EMPLOYEES

This case involved claims against the State of Alaska, individual state employees, and federal employees acting in their private capacity. Federal jurisdiction was based on The Federal Employee's Tort Liability Reform Act, 28 U.S.C. §2679. Even assuming, *arguendo*, that the claims against the federal employees provided a basis for federal jurisdiction in spite of the allegation that their acts were performed in a private capacity, it did not provide jurisdiction as to the state or the non-federal defendants. U.S. Constitution, Amendment Eleven. *Employees of the Dept. of Public Health & Welfare, State of Missouri, et al. v. Department of Public Health & Welfare, State of Missouri,* 411 U.S. 279, 36 L.Ed.2d 251, 93 S.Ct. 1614 (1973). Once the case was dismissed as to the federal parties, the district court was obligated to remand the action against the State of Alaska to the Alaska Superior Court.

II.

THE OPINION BELOW IS CONTRARY TO THE CONSTITUTION, THIS COURT'S PRIOR RULINGS, ACTS OF CONGRESS, AND IS IN CONFLICT WITH A RULING ON THE SAME SUBJECT BY THE ALASKA SUPREME COURT

In addition to prohibiting litigation against a state in federal court, the Constitution provides a clear distinction between the military and the militia. U.S. Constitution, Article 1, Section 8. The "military" is defined as the U.S. armed forces. The "militia" is the State forces. This court in *Perpich,* clarified that the National Guard is militia unless it is in federal service. *Perpich, infra,* S.Ct. at 2419.

Congress has full authority over the military, and may provide for organizing, arming, and the disciplining of the militia, but the states govern the militia. U.S. Constitution, Article I, Section 8. In *Perpich v. Department of Defense,* (1990) 496 U.S. 334, 110 L.Ed.2d 312, 110 S.Ct. 2418, this court purported to abolish the concept that the members of the militia had simultaneous federal and state status. See also *Maryland, for the Use of Levin, et al.,* 381 U.S. 41, 14 L.Ed.2d 205, 85 S.Ct. 1293 (1965). In the *Maryland* case this court announced that officers of the Maryland National Guard were state employees even though they were federally funded and were required to conform to strict federal requirements of training. Based on state appointment and immediate control exercised over them by state authorities it was "apparent" that they were state employees. *Maryland, for the Use of Levin, et al. v. United States, supra,* 381 U.S. at 48. The court also

expressly recognized the probative value of the administrative practices of the Defense Department in determining status, (Id. 52) and remarked on the effect of the state's sovereign immunity. Id. 53 fn.39. The Ninth Circuit opinion, in comparison, finds that *Feres* applies because of the substantial federal involvement with the guard. App. 10. The lower courts, as the Ninth Circuit did here, generally ignore *Maryland* and *Perpich* and continue to hold that *Feres* applies to the militia, when not in federal service, because as state militia they are a federal reserve. From a constitutional perspective, none of the cases relied upon by the Ninth Circuit or the District Court involve purely militia issues. In each case, there was a finding of federal military supervision of the conduct, federal status of the guard or a guardsman, or an assertion of federal rights, either constitutional or statutory. In the instant case, the Ninth Circuit incorrectly recites that Bowen sued the United States when he did not, it indicates that he was serving in a federal capacity when he was not, according to the Constitution Congress and the Department of Defense.

The Ninth Circuit Opinion intrudes into an area expressly left to the state legislatures and state courts. The Constitution reserves the role of governing the militia to the states and allows Congress to govern only that part of the militia that is in federal service (i.e. the National Guard of the United States). U.S. Constitution, Article 1, Section 8. Congress arms and prescribes training. Congress has not attempted to govern the militia and has expressly left the appointment and termination of officers to the states. 32 U.S.C. §324(b). The military departments of the United States acknowledge that they

have no authority over the militia and leave management of the militia to the states. App. E. The states, in fact, govern the militia, including the full time militia. The Alaska Supreme Court Opinion demonstrates the ability of that court to properly analyze its own state law. Congress understands the distinction between "governing" and providing *for* the discipline of the militia. The imposition of discipline is distinct from providing for military discipline. Discipline of the militia is also a state function. The *Uniform Code of Military Justice* is expressly inapplicable to the National Guard not in federal service. 10 U.S.C. §§801 et seq.

The Ninth Circuit opinion also ignores the critical inconsistency in holding that the National Guard is part of the military and the state cases discussing state sovereign immunity and the military. In *Emsley v. Army National Guard,* 106 Wn.2d 474 (1986) the widow of a serviceman killed at Fort Lewis Washington by artillery fire from the Washington National Guard was not barred from suing the Guard by *Feres.* In *Ables v. State of California,* 179 Cal.App.3d 328 (1986), Ables sued the State of California for torts commited in an official capacity by MP's of the California National Guard. There was no federal defense because the State is responsible for the Guard. There is a growing double standard caused by the characterization of the militia as part of the federal military when it clearly is not in practice. As a doctrine promoting federal sovereign immunity, unless there is federal liability, the *Feres doctrine* should not be applied.

In spite of this court's pronouncements in *Perpich,* the Ninth Circuit continues to expand *Feres* and now declares that it applies to members of the state militia under

exclusive state control. In so stating, the Ninth Circuit continues to rely on the *pre-Perpich* cases which were based on the discredited notion of state and federal hybridization. The Ninth Circuit confuses "full-time service" (state militia) with "active duty" (federal military) and then says that it doesn't matter so long as the state service is "federally authorized". Opinion at 11953, & fn. 4. The Court also confused state status, 10 U.S.C. §§10113, 12401, with federal reserve status, 10 U.S.C. §§12403, 12405, and thereby redefined full-time militia service as federal service based on being "federally authorized". Opinion at 11953. Congress has defined "full time service" with the militia as state service. 32 U.S.C. §101(12).

The regulation governing Bowen's termination was not federal but state law, proposed by the National Guard Bureau, but only binding because of State adoption. App. D. The regulation, as adopted in Alaska, expressly required the state Adjutant General (a political appointee of the Governor of Alaska) to assure compliance with state law. ANGR 35-03 §6-5(a). The ultimate arbiter of Alaska state law has determined that the proper state procedures were not followed. App. D.

The departure from congressional standards, the disregard of *Perpich*, and the extension of *Feres* to the states should not occur without the review and approval of this court. A denial of the petition will simply add to the confusion.

III.

THE OPINION BELOW IMPOSES THE FERES DOCTRINE ON THE STATES WITHOUT AWARDING THE MEMBERS OF THE MILITIA PROTECTIONS AFFORDED THE MEMBERS OF THE MILITARY UPON WHICH FERES IS BASED

The *Feres Doctrine* is a judicial extension of the sovereign immunity of the United States. *Feres, supra.* In justifying the application of the *Feres Doctrine,* the courts defer to the professional military judgement of active duty military officers, administrative corrective panels, and service provided substantive remedies. Before *Feres* is applied to the states, the courts should verify that the same benefits which make *Feres* tolerable in the federal setting, also apply to the states. Virtually none of them do. Article 138 of the Uniform Code of Military Justice, for example, creates a procedure for registering complaints against commanders. It does not apply to the militia and there is no substitute. As set forth above, the *UCMJ* does not apply to the militia. The Boards for Correction of Military records may order a wrongfully discharged military member reinstated. The Boards have no authority to order a militia soldier reinstated in the state militia. *UHL v. Swanstrom,* 79 F.3d 751 (8th Cir. 1996). Those in charge of the militia are not even professional soldiers. The military is primarily composed of active duty soldiers. The militia is primarily composed of part-time soldiers who meet one weekend a month. The adjutant General is a political appointee. The officer and enlisted personnel are primarily part time militia who have other jobs during the week. The military has a comprehensive system of federal regulations. The militias

are governed by the states with guidance and funding from the federal government. The dissimilarities far outweigh the similarities. For that reason alone, *Feres* should not be applied. Application of the *Feres Doctrine* is also far from uniform and its parameters are so indistinct that it reigns in confusion and injustice, and its application to the state militia is contrary to most of the arguments recited in the opinion. The Courts have observed that the *Feres Doctrine* has more to do with the proper relationship between "the courts, Congress, and the Military than with individual defendants . . . ". Under that rational *Feres* should be applied, if at all, by the federal judiciary interpreting congressional intent concerning federal legislation which applies to forces under the command of the President. In this case, we find the federal judiciary prohibiting state action in an area reserved to the states by the Constitution and Congress and to an organization under the control of the Governor of Alaska. Congress has no constitutional power to govern the militia; the militia does not belong to the federal executive branch, but to the state executive branch. The only common denominator is the federal judiciary. In this case, deference should be given to the state of Alaska, not the "military".

The *Feres* case was primarily based on the availability of alternative avenues of redress in the federal system. The federal military, for example, provides remedies for service connected death, disability, and injury. Service personnel may apply to their respective Boards for Correction of Military Records for corrective action, etc. The state is the corrective authority for the militia. Military

Officers are selected and promoted on a uniform, competitive basis. Militia officers are appointed and promoted by the states on a non-competitive basis. There is no case in which the evidence demonstrates that the militia of the various states enjoy the same or similar safeguards that justify the *Feres Doctrine* in federal setting. There is certainly no such evidence in this case. In fact, the opposite is true. Except for funding and some attempt at uniform regulation through the National Guard Bureau, the military departments defer to the states. The military receives due process hearings for termination. The militia may or may not depending on state law.

A second basis for *Feres* was the hardship to the military of judicial oversight of military decisionmaking. The courts have simply deferred to perceived military expertise in matters which were "inherently military". The militia is not "inherently military". A decision to fire a lawyer for alleged misconduct or professional dereliction is not inherently military; nor was Bowen's job as a Judge Advocate. The affirmative decision to deny a hearing involves no military expertise. It is inherently legal. No military strategy or tactics are involved. No immediate response to command is involved. The government's administrative and fiscal resources will not be unduly burdened by requiring a pre termination adversarial hearing on cases where an AGR member is involuntarily terminated for either "misconduct" or "derelection of duty." At the schools run by the military to train their legal officers, the military law classes are exclusively taught by lawyers. Judge Advocate officers are assigned and otherwise administrated by the office of the Judge Advocate General. The state bar of each state regularly

addresses the fitness of their lawyers to practice and the federal government has no power to disbar a lawyer.[10] It is undisputed that the congressional purpose behind the Full-Time National Guard program, which applied to Bowen, was encouraging the states to hire a full time lawyer to assure compliance with the law. That policy is easily frustrated if the lawyer is subject to summary removal. To that end the program provided for 5-year terms and limited basis for involuntary removal. Precluding "at will" termination protected the attorney from the "military" so that he could give an honest opinion whether or not it was popular. By making the full time attorney a state officer, Congress intended the states, not the federal government, to monitor enforcement. By refusing to review the facts, the Ninth Circuit has neutered the regulation and the program, rendering the proscription against "at will" termination impotent. The militia is now allowed to compel legal approval of their commanders' decisions on threat of termination. The lawyer becomes a rubber stamp.

The errors in this case are not the result of the courts' misinterpretation of the facts but from their insistence on refusing to look at the facts or even permit discovery to

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[10] Prior to Bowen's termination, no complaint was filed with the State Bar of Alaska or the TJAG's Ethics Committee as required by ANGR 110-6 concerning the alleged "professional dereliction". After Bowen appealed to the Superior Court, Gillean filed a complaint with the State Bar alleging that Bowen, in reporting Gillean's intent to use government funds for an illegal purpose, a violation of an attorney-client confidence. The State Bar found no basis for discipline and agreed that Bowen's client was the State of Alaska, not Gillean, on official matters.

disclose the facts because of the *Feres* Doctrine. Enforced ignorance must lead inevitably to enforced injustice, as it has here. The procedures embraced here are the judicial equivalent of, "my mind is made up, don't confuse me with the facts". Bowen was wrongfully terminated from a state position. There is no good reason to deny Bowen the remedies provided by the Constitution, by Congress, and by the State. If the law is to be judicially rewritten, the Supreme Court should do the writing.

IV.

THE IMPACT OF THIS DECISION IS SO DISPROPORTIONATE AS TO REQUIRE REVIEW

Bowen will lose pay and entitlements, of a value of more than a million dollars over his lifetime. This is balanced against the cost to the state of Alaska of complying with its own law. Bowen had no legal remedy for the wrong complained of other than a state court action. He cannot appeal administratively for reinstatement in the retirement system. The fact is that he was wrongfully terminated by the state of Alaska. The state and its employees caused the federal government to terminate its contribution towards his retirement. Because the state is responsible for the torts of the militia, *Maryland, supra, Emsley, supra, Ables, supra,* and 32 C.F.R. §564.52(b), it is improbable that the United States will voluntarily provide those benefits based on the wrongful conduct of state officials.

V.

THE PETITION SHOULD BE GRANTED TO ENSURE THE INTEGRITY OF THE JUDICIAL PROCESS IN THIS AND SIMILAR CASES

Can the *Feres Doctrine's* reliance on things "inherently military" be applied to the punishment of an attorney whose function is to encourage compliance with the law by the military? And if so, what inherently military expertise is involved in a decision to terminate a lawyer with 19 years of experience without due process? In describing the role of the U.S. Attorney in criminal cases, this court pointed out in *Berger v. United States*, (1935) 295 U.S. 78, 88, that unlike the attorneys for ordinary litigants, the U.S. Attorney, as the representative of a sovereign who is obligated to govern justly and impartially. The U.S. Attorney's role, at least in criminal cases, is not to win, but to do justice.

In *Scheuer v. Rhodes*, (1974) 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683, this court applied similar logic to government officials generally. Public officials have a duty to perform in good faith and acts or decisions made in deliberate bad faith, subject the wrongdoer to personal liability. The Public interest to be protected is the performance of duty in good faith. There is no public purpose in protecting bad faith.

Bowen argues that these principles are no less applicable here. Indeed, that same duty would seem to apply to the courts. Just as the United States can have no legitimate interest in perpetuating injustice, it is incumbent on its courts to permit justice to proceed except in unusual circumstances. In the context of this case, the

collective agencies of the United States government and the State of Alaska said that the decision to discharge Bowen was a state matter. In this case the Department of Defense letters in App. "E" recognize the inherent justice of leaving state matters to the state, particularly where the military told everyone that was where it belonged. The U.S. Attorney nevertheless intervened. Given the facts of this case, at the very least, Bowen should have been allowed to conduct discovery in order to address the legitimacy of the U.S. Attorney certification. There is at best a conflict of evidence supporting the U.S. Attorney certification and it appears inconsistent with the refusal of DoD to provide legal assistance. All of the courts found that Gillean was acting as a state official in supervising Bowen and recommending Bowen's termination. This would seem fatal to the United States substituting itself for Gillean. There is no explanation of the involvement of the Air Force officers in this case. There are no orders, no support agreements, and the record reflects that there was a specific denial of assistance at the Department of Defense level. App. E. Absent some independent support of the U.S. Attorney's declaration, the pleadings should have controlled the issue. See *Argabright v. United States*, 35 F.3d 472 (9th Cir. 1994), *National Wildlife Federation v. Espy*, 45 F.3d 1337 (9th Cir. 1995), *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480 (9th Cir. 1995).

The *Feres Doctrine* itself is based on doing justice. To the extent it is used to promote injustice, it should be overturned. A fair reading of *Feres* leads to the inescapable conclusion that it would not have occurred but for the

fact that the injured party was already compensated. *Feres* prevented the additional remedy of further litigation. *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362 (1983), extended *Feres* to constitutional issues based on military necessity. With minor exceptions, cases to which the doctrine applies should fall within one of these categories; either a separate but equal remedy is available, or the court's intervention and review would substantially interfere with the performance of the military mission. The instant case falls in neither category. The remedy provided the militia by state law and federal acquiescence, is state litigation. If this is eliminated, as the Ninth Circuit Opinion states, then there is no remedy at all. There is no showing that a due process administrative hearing is intrusive in the military mission.

Concerning Bowen's contract claim, this is the first time *Feres* has ever been applied to bar a claim based on contract. U.S. Military personnel can pursue contract claims in the United States Court of Claims. Bowen's contract was with the State of Alaska and his remedy is under state contract law. The extension of Feres to eliminate contract right due to militia services is a decision which should only be made, if at all, by the Supreme Court.

CONCLUSION

The *Feres Doctrine* has never been criticized as being too fair. Certiorari should be granted to review its application generally and to specifically determine whether it can be applied to the states without violating the Constitution, the express will of Congress, the sovereignty of the States, and the right of individuals to due process of law and equal protection of the law. The questions presented are of immediate, national concern because of conflicts in the case law interpreting *Feres* generally, and the existing differences between the positions of the States, Congress, and the Department of Defense on the one hand, and the federal judiciary on the other, regarding the application of *Feres* to the States.

Respectfully submitted,

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Admitted November 26, 1990

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY W. BOWEN, *Plaintiff-Appellant,* v. KEITH OISTEAD; UNITED STATES OF AMERICA; HUGH L. COX, III; DAN E. DENNIS; KENNETH M. TAYLOR; STATE OF ALASKA, *Defendants-Appellees.*	No. 96-35296 D.C. No. CV-95-00319-JWS OPINION

Appeal from the United States District Court
for the District of Alaska
John J. Sedwick, District Judge, Presiding

Submitted August 5, 1997*
Seattle, Washington

Filed September 12, 1997

Before: Dorothy W. Nelson, Charles Wiggins, and Alex Kozinski, Circuit Judges.

Opinion by Judge Nelson

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* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

COUNSEL

Pat K. Bowen, Thousand Oaks, CA, for plaintiff-appellant.

Kenneth S. Roosa, Assistant United States Attorney, Anchorage, AK, for defendant-appellee United States.

Patrick J. Gullufsen, Assistant Attorney General, Juneau, AK, for defendant-appellee State of Alaska.

OPINION

D.W. NELSON, Circuit Judge:

Major Gary Bowen appeals the district court's dismissal of his complaint against the Alaska National Guard, certain of its members, the United States, and certain commissioned officers of the United States Air Force. The district court determined that Bowen's claims against the military were nonjusticiable under *Feres v. United States*, 340 U.S. 135 (1950). The district court also dismissed Bowen's RICO cause of action because Bowen failed to state a claim upon which relief could be granted. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Bowen entered full-time duty with the Alaska Air National Guard in June 1984 as a staff judge advocate.[1]

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[1] The National Guard "occupies a distinct role in the federal structure that does not fit neatly within the scope of either state or national concerns." *Knutson v. Wisconsin Air Nat'l*

Bowen entered this duty as a member of the Active Guard/Reserve ("AGR"), a program authorized by federal statute, *see* 32 U.S.C. § 502(f), and created to provide full-time military support personnel to assist in the administration of the National Guard of the various states. Bowen's tour of duty in the AGR was extended on April 22, 1991 by order of the Governor of Alaska. Bowen was ordered to continue his duties as a staff judge advocate and attorney-advisor at the headquarters of the Alaska National Guard until June 3, 1996, "unless sooner relieved by competent authority."

In 1992, Bowen was asked to implement a military justice system for the Alaska National Guard. Colonel Jerry Gillean was Bowen's immediate supervisor on this project and Alaska National Guard Brigadier General Dan Dennis was Bowen's general supervising officer.

On February 22, 1993, Colonel Gillean advised Bowen that he intended to recommend Bowen's involuntary termination from the AGR program. Colonel Gillean informed Bowen that Bowen's unsatisfactory conduct had "resulted in a breach of trust between the leadership of

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Guard, 995 F.2d 765, 767 (7th Cir. 1993). It is a hybrid organization that serves the state within which it is located as well as the federal government in times of need. "[T]he Guard may serve the state in times of civil strife within its borders while also being available for federal service during national emergencies." *Id.; see also New Jersey Air Nat'l Guard v. Federal Labor Relations Auth.*, 677 F.2d 276, 279 (3d Cir. 1982) ("Within each state the National Guard is a state agency, under state authority and control. At the same time, the activity, makeup, and function of the Guard is provided for, to a large extent, by federal law.").

the Alaska National Guard and [Bowen]," and that Bowen's subsequent misconduct had "further eroded the relationship that should exist" between the leadership of the Guard and Bowen.

On April 1, 1993, Colonel Gillean formally recommended termination of Bowen's tour of duty in the AGR. Brigadier General Kenneth Taylor reviewed and concurred in Colonel Gillean's recommendation, and informed Bowen that he planned to recommend Bowen's separation from full-time AGR duty. This recommendation, along with Bowen's response thereto, was forwarded to Brigadier General Dennis, who then formally recommended the termination of Bowen's AGR duty to Hugh Cox, Alaska's Adjutant General and the final authority for involuntary removal from AGR duty. On May 13, 1993, the Adjutant General endorsed Brigadier General Dennis' recommendation, and Bowen was formally terminated from his tour of duty in the AGR on May 20, 1993.

On May 26, 1995, Bowen filed suit in Alaska state court. Bowen's complaint alleged tortious and unconstitutional conduct by federal defendants William King, Lance Sigmond, Charles Williams, Clinton Pearson, and James Gamboa, all of whom were attorneys in the Judge Advocate General Branch on active duty in the United States Air Force during the time of the events giving rise to Bowen's complaint. The complaint also alleged unlawful, tortious, and unconstitutional conduct by state defendants Keith Oistead, Hugh Cox, Dan Dennis, Kenneth Taylor, Jerry Gillean, and the State of Alaska. Specifically, Bowen's complaint alleged breach of contract, wrongful termination of employment, denial of administrative due

process and state constitutional rights, tortious interference with contract, denial of equal protection, legal malpractice, defamation, misrepresentation, and RICO violations.

Pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679(d)(1), the United States Attorney for the State of Alaska certified that federal defendants King, Williams, Pearson, and Gamboa were employees of the United States acting within the scope of their employment at all times relevant to the suit. The United States therefore substituted itself in place of these defendants, and removed the case to federal court pursuant to 28 U.S.C. § 1446(a).

On February 8, 1996, the district court granted all defendants' motions to dismiss. The district court's decision was based principally upon the doctrine of intramilitary immunity first announced in *Feres v. United States*, 340 U.S. 135 (1950). Bowen appeals from this decision.

STANDARD OF REVIEW

A motion to dismiss pursuant to the *Feres* doctrine is treated as a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). *Jackson v. United States*, 110 F.3d 1484, 1486 (9th Cir. 1997). The question of whether the *Feres* doctrine is applicable to the facts reflected in the record of a case is a question of law reviewed de novo. *Id.* at 1486.

A dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) is a ruling on a question of law

subject to de novo review. *Stone v. Travelers Corp.*, 58 F.3d 434, 436-37 (9th Cir. 1995).

DISCUSSION

A. Bowen's tort and constitutional claims

Both the United States and the State of Alaska (on behalf of itself and the individual state defendants) contend that the *Feres* doctrine bars Bowen's tort and constitutional claims against the military and its members. We agree.

In *Feres v. United States*, the Supreme Court held that members of the armed services could not sue the Government for injuries that "arise out of or are in the course of activity incident to service." 340 U.S. at 146. This bar has been interpreted broadly. "[P]ractically any suit that 'implicates the military judgments and decisions' . . . runs the risk of colliding with *Feres*." *Persons v. United States*, 925 F.2d 292, 295 (9th Cir. 1991) (quoting *United States v. Johnson*, 481 U.S. 681, 691 (1987)). The Supreme Court has held that *Feres* applies not only to tort actions brought under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., but to *Bivens* actions as well. *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) ("enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations"); *United States v. Stanley*, 483 U.S. 669, 680-81 (1987) (*Chappell* approach applies to all activities performed "incident to service" and not merely to activities performed within the officer/

subordinate relationship).[2] Furthermore, *Feres* bars intentional tort claims as well as simple negligence claims. *See Mollnow v. Carlton*, 716 F.2d 627, 628 (9th Cir. 1983). Finally, *Feres* is not limited to suits against the United States. We have extended *Feres* to "suits between individual members of the military, recognizing an 'intramilitary immunity' from suits based on injuries sustained incident to service." *Lutz v. Secretary of the Air Force*, 944 F.2d 1477, 1480-81 (9th Cir. 1991). In sum, the *Feres* doctrine is applicable "whenever a legal action 'would require a civilian court to examine decisions regarding management, discipline, supervision, and control of members of the armed forces of the United States.' " *Hodge v. Dalton*, 107 F.3d 705, 710 (9th Cir. 1997) (quoting *McGowan v. Scoggins*, 890 F.2d 128, 132 (9th Cir. 1989)).[3]

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[2] The ban on *Bivens* actions has been extended to section 1983 actions against state officials. *See, e.g., Wright v. Park*, 5 F.3d 586, 591 (1st Cir. 1993) ("[T]here is no principled basis for according state actors sued under 42 U.S.C. § 1983 a different degree of immunity than would be accorded federal actors sued for an identical abridgement of rights under *Bivens*."); *see also Sebra v. Neville*, 801 F.2d 1135, 1142 (9th Cir. 1986) ("Although we have not applied *Feres* to § 1983 claims, recent case authority indicates that the doctrine extends to claims for damages from alleged constitutional or regulatory violations."). We agree with the First Circuit and believe that insofar as the *Feres* doctrine extends to the state National Guard units, it shields state military officers from constitutional claims brought under section 1983 to the same extent that it protects federal military personnel from defending against *Bivens* actions raising the very same claims.

[3] The Eighth Circuit recognizes two exceptions to the *Feres* doctrine. First, facial challenges to the constitutionality of a military regulation or statute are not barred. Second, limited judicial review of final agency action is permitted. *See Watson v.*

Bowen attempts to escape the reach of *Feres* by arguing that the doctrine applies only to the federal military structure. First, Bowen claims that his status as a state, rather than federal, military employee exempts his claim from the *Feres* bar. We previously have rejected this argument. "It is beyond question that the *Feres* doctrine generally applies to claims brought by National Guard members." *Stauber v. Cline*, 837 F.2d 395, 399 (9th Cir. 1988); *see also Jackson*, 110 F.3d at 1487 ("Members of the National Guard and the Reserves are service members under *Feres*."); *cf. Wright v. Park*, 5 F.3d 586, 588 (1st Cir. 1993) ("It is axiomatic that the National Guard is military in character."). The fact that Bowen was not on active duty with the United States Air Force Reserve[4] does not alter this conclusion, *see, e.g., Quintana v. United States*, 997 F.2d 711, 712 (10th Cir. 1993) ("active duty status is not necessary for the *Feres* 'incident to service' test to apply"); *Velez v. United States ex rel. Dept. of Army*, 891 F.Supp. 61, 63 (D. Puerto Rico 1995) ("The distinction between an 'active' and 'inactive' National Guard serviceman relative to the *Feres* doctrine is irrelevant."), particularly where, as here, the service member is on full-time duty as a member of the federally authorized AGR. We follow *Stauber* and conclude that Bowen's status as a

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Arkansas Nat'l Guard, 886 F.2d 1004, 1010-11 (8th Cir. 1989). Neither exception is implicated by Bowen's claims. Like the plaintiff in *Watson*, Bowen "challenges the constitutionality of a discrete personnel action taken pursuant to unassailably valid statutory authority." *Id.* at 1010 n. 15.

[4] A National Guardsman is on active duty when called to service by the United States, and is on reserve duty when acting as a member of the state's National Guard.

member of the National Guard triggers application of *Feres*, despite the fact that he was serving as a member of the Alaska Air National Guard under the direct authority of state officers.

While Bowen's first argument against the application of the *Feres* doctrine focuses upon his own status as a state employee, his second argument against *Feres* focuses upon the status of the defendants. Bowen urges us not to bar his claims against the *state* officers because, he argues, the *Feres* doctrine "cannot be applied to the states," *i.e.*, it is applicable only to those actions where federal military personnel are somehow implicated in the alleged unlawful conduct. Thus, Bowen distinguishes *Stauber* by noting that the parties in that case were "under the direct command of a uniformed, full-time U.S. Army lieutenant colonel." *See Stauber*, 837 F.2d at 397.

In *United States v. Johnson*, the Supreme Court noted that it had

> never suggested that the military status of the alleged tortfeasor is crucial to the application of the [*Feres*] doctrine. Nor have the lower courts understood this fact to be relevant under *Feres*. Instead, the *Feres* doctrine has been applied consistently to bar all suits on behalf of service members against the Government based upon service-related injuries.

481 U.S. 681, 686-88 (1987).

Courts have not interpreted this language to mean that the service person's suit must be against the *federal* government or *federal* officers. The overwhelming weight of authority indicates that state National Guard officers

are protected from suit by fellow Guardsmen by the *Feres* doctrine. *Stauber,* for example, applied *Feres* to a Guardsman's claims against individual members of the Alaska National Guard, the Alaska Adjutant General, the Alaska Department of Military and Veterans Affairs, and the State of Alaska itself. *See also Uhl v. Swanstrom,* 79 F.3d 751 (8th Cir. 1996) (applying *Feres* bar to suit by National Guardsman against his commanding state officer, the Adjutant General of the Iowa Air National Guard, and the Iowa Air National Guard); *Lovell v. Heng,* 890 F.2d 63 (8th Cir. 1989) (National Guardsman's § 1983 action against state National Guard officers barred under *Feres*); *Townsend v. Seurer,* 791 F. Supp. 227, 229 (D. Minn. 1992) ("[R]egardless of whether the suit is brought against the state National Guard and individual Guard personnel or against the United States and individual Guard personnel, the *Feres* doctrine will bar the action."). Indeed, we indicated in *Stauber* that the *Feres* doctrine "has far more to do with the proper relation between the courts, Congress and the military than it has to do with individual defendants. . . . It is a judicial doctrine leaving matters incident to service to the military, in the absence of congressional direction to the contrary." *Stauber,* 837 F.2d at 399.

These cases implicitly recognize that the military apparatus of the United States cannot be divided into strictly state and federal components. We endorse these holdings: *Feres* applies to the state National Guards and their members due to the integral role they play as part of the nation's defense force and the substantial degree to which the state National Guards are financed, regulated, and controlled by the federal government even when not

called into active federal service. Consequently, under *Stauber* and the clear weight of authority in other circuits, Bowen's constitutional claims and claims sounding in tort are subject to the *Feres* doctrine.

Under *Feres*, judicial review of those claims is barred if the harms about which Bowen complains arose out of or in "the course of activity incident to service." *Feres*, 340 U.S. at 146. We have no trouble concluding that the personnel decisions contested by Bowen in fact were made "incident to service." *See United States v. Shearer*, 473 U.S. 52, 58-59 (1985) (noting that decision to discharge a serviceman is an "essentially professional" one and that respondent's "attempt to hale Army officials into court to account for their supervision and discipline of [a serviceman] must fail"); *see also Lutz*, 944 F.2d at 1485 ("The Supreme Court made plain in *Stanley* that in deciding whether *Feres* applies, courts should answer the broader question of whether 'the injury arises out of activity incident to service' . . . rather than considering any actual impact on military discipline."). Accordingly, Bowen's tort and constitutional claims contesting those personnel decisions are barred.

B. **Bowen's contract claim**

To date, *Feres* and its progeny have been applied only to claims sounding in tort or to assertions of constitutional wrongs. Accordingly, the *Feres* doctrine does not resolve the propriety of the district court's dismissal of Bowen's breach of contract claim. We conclude that the district court's action was correct because Bowen's claim is nonjusticiable.

In *Mier v. Owens*, we refused to entertain the Title VII claim of a National Guardsman due to the fact that "the discriminatory personnel actions [alleged by the Guardsman] are integrally related to the military's unique structure." 57 F.3d 747, 750 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1317 (1996). We noted that "challenges to discharge by the Guard . . . are nonjusticiable because judicial review 'would seriously impede the military in performance of its vital duties.' " *Id.* (quoting *Christoffersen v. Washington State Air Nat'l Guard*, 855 F.2d 1437, 1444 (9th Cir. 1988)); *see also Sebra v. Neville*, 801 F.2d 1135, 1142 (9th Cir. 1986) (courts are "properly wary of intruding upon" military transfer decisions).

In *Mier*, we recognized that "personnel actions are not always integrally related to the military's unique structure." *Mier*, 57 F.3d at 750. For example, a Title VII claim challenging the refusal to allow a female civilian employee to embark on a Naval aircraft carrier was held to be justiciable in *Bledsoe v. Webb*, 839 F.2d 1357, 1360 (9th Cir. 1988). We held in *Bledsoe* that the claim was justiciable because the plaintiff was a civilian employee and the challenged conduct did not implicate a military policy. We specifically distinguished the conduct involved in *Bledsoe* from "inherently military" determinations such as termination decisions. *See id.*

Unlike the Title VII claim in *Bledsoe*, the termination decision challenged by Bowen does implicate "inherently military" concerns. Thus, *Mier* and the cases upon which it relies dictate that Bowen's breach of contract claim – which is at heart an objection to the military's decision to discharge him from the AGR program – is nonjusticiable.

Therefore, the district court's decision to dismiss this claim for lack of subject matter jurisdiction was correct.

C. **Bowen's RICO claim**

The district court determined that Bowen failed to state a RICO claim and dismissed his RICO allegation pursuant to Federal Rule of Civil Procedure 12(b)(6).

To state a claim under RICO, Bowen must demonstrate that the defendants engaged in at least two acts of "racketeering activity," as that term is defined in 18 U.S.C. § 1961(1). *See Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 191 (9th Cir. 1987). In his complaint, Bowen alleged that "the actions of the individual defendants constitutes [sic] a criminal conspiracy to deprive [Bowen] of his civil rights and to injure his reputation and standing in the community." Civil rights violations and injury to reputation do not fall within the statutory definition of "racketeering activity." Accordingly, Bowen's complaint fails to state a claim under RICO.

On appeal, Bowen does not attack the district court's substantive judgment. Rather, he simply asserts that the district court should have permitted him to amend his complaint before dismissing the RICO claim. However, Bowen never requested an opportunity to amend his complaint in the district court. Furthermore, Bowen fails to explain how he could have amended his complaint to state a claim under RICO. Indeed, Bowen does not substantively respond *at all* to the defendants' arguments on appeal that his RICO claim was properly dismissed. Accordingly, Bowen has waived this issue on appeal. *See Han v. United States*, 944 F.2d 526, 527 n.1 (9th Cir. 1991)

(refusing to reach merits of argument that was not before the district court and raised on appeal "only briefly, with no citation and little argument"); *International Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985) (court "will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in appellant's opening brief").

CONCLUSION

Bowen's tort and constitutional claims against the defendants are barred by the *Feres* doctrine. Likewise, Bowen's breach of contract claim is nonjusticiable insofar as consideration of the claim would involve the court in "inherently military" concerns. Finally, Bowen's failure to allege that the defendants engaged in at least two qualifying predicate acts undermines his RICO claim. Accordingly, we affirm the district court's decision to dismiss Bowen's complaint.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GARY W. BOWEN, Plaintiff-Appellant, v. **KEITH OISTEAD; UNITED STATES OF AMERICA; HUGH L. COX, III; DAN E. DENNIS; KENNETH M. TAYLOR; STATE OF ALASKA,** Defendants-Appellees.	No. 96-35296 D.C. No. CV-95-00319-JWS **ORDER** (Filed Jan. 22, 1998)

BEFORE: D.W. NELSON, WIGGINS and KOZINSKI, Circuit Judges

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judge Kozinski voted to reject the suggestion for rehearing en banc, and Judges D.W. Nelson and Wiggins recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

GARY W. BOWEN, Plaintiff, vs. KEITH W. OISTEAD, WILLIAM S. KING, CHARLES H. WILLIAMS, CLINTON R. PEARSON, JAMES GAMBOA, HUGH L. COX, III, DAN E. DENNIS, JERRY W. GILLEAN, KENNETH M. TAYLOR, STATE OF ALASKA, and JOHN DOES 1-100, Defendants.	Case No. A95-319 CV (JWS) ORDER FROM CHAMBERS (Filed Feb. 08, 1996)

I. MOTION PENDING

At Docket 10, defendant the United States of America ("United States") moves, pursuant to Fed. R. Civ. P 12(b)(1) and (6), for dismissal of the complaint on the grounds that this court lacks subject matter jurisdiction and the complaint fails to state a claim upon which relief may be granted. At Docket 11, defendant the State of Alaska ("State"), Keith W. Oistead, Hugh L. Cox, III, Dan E. Dennis, and Kenneth M. Taylor join in the United States' motion and separately move to dismiss the complain on similar grounds.

At Docket 13, *pro per* plaintiff Gary W. Bowen ("Bowen") moves for partial summary judgment against the State and defendant Taylor, declaring that Taylor lacked the requisite authority to terminate Bowen, because Taylor was not the commander of the Alaska Air National Guard. The issues have been fully briefed. No party has requested oral argument, and it would not be of material aid to the court.

II. FACTS

Bowen was a member of the Air Force Reserve and the Air National Guard of the United States. On June 4, 1984, he was called to full-time National Guard training duty with the Alaska Air National Guard as an attorney/advisor in Active Guard/Reserve ("AGR") status. On June 11, 1993, the Alaska Department of Military & Veteran Affairs, Office of the Adjutant General, terminated Bowen's AGR status, based on misconduct in accordance with Air National Guard Regulation 35-03.[1]

On May 26, 1995, Bowen filed a complaint in the Superior Court for the State of Alaska, Third Judicial District, against Keith W. Oistead, William S. King, Charles H. Williams, Clinton R. Pearson, James Gamboa, Hugh L. Cox, III, Dan E. Dennis, Jerry W. Gillean, Kenneth M. Taylor, and the State of Alaska. The First Amended Complaint alleges breach of contract, wrongful termination of employment, denial of administrative due

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[1] Bowen is still a member of the Air Force Reserve.

process and state constitutional rights, tortious interference with contract, denial of equal protection, legal malpractice, defamation, misrepresentation, and violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1916-1968. The gravamen of the complaint is that Bowen's employment as Staff Judge Advocate to the National Guard was terminated without just cause, and that defendants perpetrated intentional acts outside the scope of their authority as members of the organized militia of the State of Alaska. Defendants removed the case to this court under 28 U.S.C. §§ 1446(a) and 2679, and 25 U.S.C. § 450f(d).

Also on May 26, 1995, Bowen filed a claim with the Air Force at Elmendorf Air Force Base, against King, Williams, Pearson, Gamboa, Lance Sigmond, and "other attorneys in the Employ of the United States Air Force," alleging legal malpractice, interference with contract, wrongful termination, and denial of due process and equal protection. At the time Bowen was terminated, defendants named in Bowen's claim were attorneys in the Judge Advocate General branch on active duty in the Air Force. The claim alleges that King negligently represented Bowen as a client in conjunction with his termination, and that, as King's supervisor, Williams interfered with King's representation of Bowen. The claim further alleges that Pearson, Gamboa, and Sigmond negligently practiced law by wrongfully representing a state agency, thereby interfering with Bowen's employment contract with the State and aiding and abetting state authorities in wrongfully terminating Bowen from his position as a State employee. The Air Force apparently has not issued a decision on Bowen's claim.

Pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679(d)(1), the United States Attorney has certified that defendants Gillean, King, Williams, Pearson, and Gamboa were employees of the United States, acting within the scope of their employment at all times relevant to the allegations made against them in the complaint. The United States has substituted itself in place of those defendants.

III. DISCUSSION

A. Statutory Background (National Guard)

Under Article I, Section 8, Clauses 15 and 16 of the United States Constitution, every state retains command and control over its own armed forces. Under its constitutional authority to "raise and support armies," Congress also has crealed the National Guard of the United States, a reserve component of the Armed Forces of the United States. *Perpich v. Department of Defense*, 496 U.S. 334, 338, 110 S. Ct. 2418, 2421 (1990); 32 U.S.C. § 101(2)-(5); 10 U.S.C. § 101(c)(3). "Army National Guard of the United States" is the reserve component of the Army all of whose members are members of the Army National Guard. 32 U.S.C. § 101(5). "Air National Guard of the United States" is the reserve component of the Air Force all of whose members are members of the Air National Guard. 32 U.S.C. § 101(7); 10 U.S.C. §§ 3077.

Consequently, although a state's National Guard is a state agency, "it is also part of the organized militia of the United States, 10 U.S.C. § 101(12), and may be called to active service at any time. 10 U.S.C. § 8500." *Christoffersen*

v. Washington State Air Nat'l Guard, 855 F.2d 1437, 1441 (9th Cir. 1988), *cert. denied*, 490 U.S. 1098, 109 S. Ct. 2448 (1989).

> The unchallenged validity of the dual enlistment system means that the members of the [State] National Guard . . . who are ordered into federal service with the National Guard of the United States lose their status as members of the state militia during their period of active duty. If that duty is a training mission, the training is performed by the Army in which the trainee is serving, not by the militia from which the member has been temporarily disassociated. "Each member of the Army National Guard of the United States who is ordered to active duty is relieved from duty in the National Guard of his State or Territory, or of Puerto Rico or the District of Columbia, as the case may be, from the effective date of his order to active duty until he is relieved from that duty." 32 U.S.C. § 325(a).

Perpich, 496 U.S. at 347-48, 110 S. Ct. at 2426. Members of the National Guard of the United States ordered to active duty are returned to their state National Guard status upon relief from that duty. 32 U.S.C. § 325. "Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be," a member of the National Guard may be ordered to perform training, in addition to the duty prescribed under 32 U.S.C. § 502(a). 32 U.S.C. § 502(f).

> "Full-time National Guard duty" means training or other duty, other than inactive duty, performed by a member of the Air National Guard of the United States or the Air National Guard of a State or territory, the Commonwealth of

> Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of this title for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.

32 U.S.C. § 101(19).

The Alaska Air National Guard is commanded by the governor through the adjutant general. AS 26.05.160-170.

B. Motions at Dockets 10 and 11

1. Arguments Raised

The United States argues that Bowen's claims against all individually names defendants should be dismissed for lack of subject matter jurisdiction under the doctrine of intra-military immunity set forth in *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153 (1950) because: (1) the claims are inextricably incident to Bowen's military service; and (2) they are not cognizable under the Federal Tort Claims Act ("FTCA"), Bowen's exclusive remedy for any tortious acts committed by federal employees and military members acting within the scope of their employment. With respect to its own liability, the United States argues that: (1) a guardsman in federal training status injured "incident to service," falls within the parameters of the *Feres* doctrine and cannot sue the United States; and (2) this suit is premature because Bowen has not exhausted his intra-military administrative remedies. The United States further argues that Bowen failed to state a claim under RICO, because he does not sufficiently allege a predicate offense, a pattern

of such activity is not identified, and the period and nature of the conspiracy are not satisfactorily delineated.

The State makes similar arguments and additionally assert that Bowen's claim of alleged violation of procedural due process must be dismissed, because he has no constitutionally protected property interest in continued employment with the Alaska National Guard. *Christoffersen*, 855 F.2d at 1443.[2]

Bowen argues that defendants Oistead, Cox, Dennis, Taylor, and Gillean were not acting as members of a reserve of the armed forces of the United States and were not in execution of any federal military duties, and, thus, were purporting to act as officers of the state militia when they terminated Bowen's full-time militia duty with the State.

2. Intramilitary Immunity

The United States argues that Bowen's status as an AGR is inextricably bound with his military status as a

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[2] The State argues that Bowen has failed to state a claim for which relief may be granted because he had no property interest in his military position sufficient to require a pre-termination hearing with respect to his employment in the National Guard. The State submits the affidavit of Assistant Attorney General Patrick J. Gullufsen, who represented the State of Alaska, Department of Military and Veterans Affairs, in connection with a state administrative appeal Bowen filed after his termination. Apparently, the appeal was based on alleged violation of procedural rights, an issue not pending before the Alaska Supreme Court in *Bowen v. State of Alaska, Department of Military and Veterans Affairs, Alaska National Guard*, Alaska Supreme Court Nos. S-6822/S-6842.

member of the Air National Guard and the Air Force Reserve, such that the disciplinary standards for his position were set and controlled by the United States Air Force. *See* 32 U.S.C. § 501(a) ("The discipline, including training, of the Air National Guard shall conform to that of the Air Force"). As such, any claims sounding in tort and arising out of Bowen's status as a member of the Air National Guard would be barred under the doctrine established in *Feres*, 340 U.S. at 135, 71 S. Ct. at 153.

In *Feres*, the Supreme Court held that members of the armed services could not sue the government for injuries that arise out of or occur in the course of activity incident to military service, because relations between the government and its military personnel were "distinctively federal in character," exclusively governed by federal law, and a comprehensive, even-handed government compensation scheme was available for service-connected injuries. 340 U.S. at 143-45, 71 S. Ct. at 158-59. *See also United States v. Shearer*, 473 U.S. 52, 57, 105 S. Ct. 3039 (1985) (emphasizing effect private lawsuits might have on military discipline). "Although *Feres* itself did not compel dismissal for lack of subject matter jurisdiction, such a result comports with the development of the doctrine, which has grown as a judge made exception to the Federal Tort Claims Act's (FTCA's) waiver of sovereign immunity." *Stauber v. Cline*, 837 F.2d 395, 398 (9th Cir.), *cert. denied*, 488 U.S. 817, 109 S. Ct. 55, *reh'g denied*, 488 U.S. 975, 109 S. Ct. 516 (1988).

"It is beyond question that the *Feres* doctrine generally applies to claims brought by National Guard members." *Stauber*, 837 F.2d at 399. In *Stauber*, the Ninth Circuit held that state law tort claims by a civilian

National Guard mechanic-technician against other Guard members who allegedly harassed him arose incident to military service and, thus, were barred by intramilitary immunity. Although the parties had dual status as Guard members and civilian employees for some purposes, the court found it significant that the conduct of the parties was subject to military command structures and military discipline and that, as members of the National Guard, they were under direct command of active duty military officers. *See also Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 671-72, 97 S. Ct. 2054, 2057-58, *reh'g denied*, 434 U.S. 882, 98 S. Ct. 250 (1977) (barring Missouri Air National Guardsman, injured during military training, from recovering against United States because injuries occurred incident to military service); *Mattos v. United States*, 412 F.2d 793 (9th Cir. 1969) (applying *Feres* doctrine to preclude suits by active duty service members to suits by reservists against fellow reservists for injuries received while on reserve training).

The *Feres* doctrine also has been extended to preclude constitutional damage suits between service members for injuries arising out of military service. *See Chappell v. Wallace*, 462 U.S. 296, 305, 103 S. Ct. 2362, 2368 (1983) ("enlisted military personnel may not maintain a suit to recover damages form a superior officer for alleged constitutional violations"); *Mollnow v. Carlton*, 716 F.2d 627, 628 (9th Cir. 1983), *cert denied*, 465 U.S. 1100, 104 S. Ct. 1595 (1984), *reh'g denied*, 466 U.S. 954, 104 S. Ct. 2164 (1984).

As the Ninth Circuit recently stated:

> Courts regularly decline to hear lawsuits involving personnel actions integrally related to the military's unique structure. Military personnel cannot sue superior officers to recover damages for alleged constitutional violations because the "relationship between enlisted military personnel and their superior officers . . . is at the heart of the necessarily unique structure of the Military Establishment."

Mier v. Owens, 57 F.3d 747, 749-50 (9th Cir. 1995) (quoting *Chappel*, 462 U.S. at 305, 103 S. Ct. at 2368); *Sebra v. Neville*, 801 F.2d 1135, 1142 (9th Cir. 1986) (Guard technician's challenge to military transfer is nonjusticiable; "transfer decisions go to the core of deployment of troops and overall strategies of preparedness"); *Christoffersen*, 855 F.2d at 1444.

In some instances, personnel actions are not integrally related to the military's structure and, thus, are justiciable. *See, e.g., Bledsoe v. Webb*, 839 F.2d 1357, 1360 (9th Cir. 1988) (finding that Title VII claim challenging refusal to allow female civilian employee to embark on Naval aircraft carrier is not so inherently military as to be nonjusticiable); *Lutz v. Secretary of the Air Force*, 944 F.2d 1477, 1486 (9th Cir. 1991) (intra-military immunity did not apply to claims brought by former Air Force major where three sergeants broke into her office to open and disseminate her mail; challenged conduct neither arose out of nor was incident to military service).

Here, the alleged violations of constitutional rights clearly arise out of personnel matters uniquely involving military command structures and military discipline.

Therefore, the court finds Bowen's claims against the United States and all individually named defendants nonjusticiable.

3. RICO

The complaint alleges that individual defendants are liable under RICO, because their actions constitute a criminal conspiracy to deprive Bowen of his civil rights and to injure his reputation and standing in the community, and because defendants have engaged in a corrupt enterprise and have used instrumentalities in interstate commerce to advance their corrupt enterprise.

RICO provides in pertinent part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs though a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). "It shall be unlawful for any person to conspire to violate . . . [subsection] (c) of this section." 18 U.S.C. § 1962(d).

To state a claim for damages under RICO, Bowen must first demonstrate that defendants' conduct constitutes "racketeering activity" as defined in Section 1961. However, he has not asserted a predicate offense listed in Section 1961. "A plaintiff in a RICO section 1962(c) case must present proof of four RICO elements: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering

activity." *Sigmond v. Brown*, 828 F.2d 8 (9th Cir. 1987) (internal quotations ommitted). "A pattern of racketeering activity does not exist unless there is evidence of two predicate acts. *Brady v. Dairly Fresh Prod. Co.*, 974 F.2d 1149 (9th Cir. 1992); 18 U.S.C. § 1961(5). Therefore, the complaint fails to state a RICO claim.

C. Bowen's Motion at Docket 13

Bowen moves for partial summary judgment against the State and Taylor, declaring that at all relevant times Taylor was a State employee (Director of the Air National Guard Component of the Alaska National Guard) and, thus, was not authorized to take adverse action in executing documents with respect to Bowen. Because the controversy is not justiciable, Bowen's motion is moot.

IV. CONCLUSION

For the reasons set out above, the motions at Dockets 10 and 11 are GRANTED. Because the action is dismissed, the motion at Docket 13 is DENIED as moot. All other pending motions are DENIED as moot. This action is DISMISSED.

DATED this 8 day of February 1996 at Anchorage, Alaska.

/s/ John W. Sedwick
JOHN W. SEDWICK
UNITED STATES
DISTRICT JUDGE

APPENDIX D

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, DEPARTMENT OF MILITARY AND VETERANS AFFAIRS, ALASKA NATIONAL GUARD, Appellant and Cross-Appellee, v. GARY W. BOWEN, Appellee and Cross-Appellant.	Supreme Court Nos. S-6822/6842 Superior Court No. 3AN-93-5009 CI OPINION [No. 4946 – February 13, 1998]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Karen L. Hunt, Judge.

Appearances: Patrick J. Gullufsen, Assistant Attorney General, and Bruce M. Botelho, Attorney General, Juneau, for Appellant and Cross-Appellee. Milford H. Knutson, Bledsoe & Knutson, Anchorage, for Appellee and Cross-Appellant.

Before: Compton, Chief Justice, Rabinowitz, Matthews, and Eastaugh, Justices, and Carpeneti, Justice pro tem. [Moore, Justice, not participating.]

CARPENETI, Justice pro tem.

I. INTRODUCTION

Gary Bowen, who had served for nine years in the active state service of the state organized militia, was

involuntarily terminated from his employment in May 1993. He appealed his termination to the superior court, arguing principally that the State Department of Military and Veterans Affairs, Alaska National Guard (State) had failed to follow the provisions of the Alaska Personnel Act and had deprived him of due process of law in the procedures that it employed in terminating his employment. The State contended that Bowen was a federal employee and that state courts had no jurisdiction over the matter; that, regardless of the jurisdiction of the state courts, federal law governed the right and nature of any hearing to which Bowen was entitled; that even if he were a state employee the state personnel act did not apply to him; and that the termination procedures employed did not violate his due process rights under the Alaska Constitution.

Superior Court Judge Karen Hunt concluded that Alaska courts had jurisdiction over this dispute, that Bowen was a state employee, that the Alaska Personnel Act did not apply to him, and that his protected property interest in full severance pay was affected without due process under the Alaska Constitution. Judge Hunt found that Bowen had no protected property interest in continued employment and no protected liberty interest in his reputation and his ability to gain future employment. The court remanded the matter to the State for a hearing to remedy the violation concerning severance pay. Both parties have appealed.

The State appeals the superior court's decision in several respects. The State submits that while federal law and regulations "arguably" have completely occupied the field of National Guard employment so that the states are

pre-empted from legislating or regulating in this field, states are, in any case, pre-empted from legislating or regulating in a manner which conflicts with federal law, and that applying "state due process law and procedures" in this case conflicts with the federal procedures regulating removal of employees and therefore may not control this case. In addition, the State argues that National Guard separation and separation pay issues are not reviewable; that Bowen failed to exhaust his administrative remedies; and that Bowen lacks a property interest in full separation pay which is protected by due process. Assuming Bowen's property interest in full separation pay is protected by due process, the State further contends that the requirements of due process were satisfied by the remedies available to Bowen. Finally, the State maintains that the superior court erred in determining that the federal regulation governing the procedure to be employed in connection with the discharge of a National Guard employee was unconstitutional as applied under the state constitution.

Bowen cross-appeals, arguing that the superior court erred in failing to find he was entitled to: (1) the protections of the State of Alaska Personnel Act (AS 39.25.010 et seq.), and (2) a pretermination hearing under article I, section 7 of the Alaska Constitution. Bowen argues that he was deprived of a liberty interest without due process of law as guaranteed under article I, section 7, and the Fourteenth Amendment of the United States Constitution, by being denied a pretermination administrative hearing prior to the decision of the DMVA to terminate his employment. Finally, Bowen argues that the superior court erred in failing to order a trial de novo as the

method of conducting the pretermination administrative hearing ordered by the court, or, in the alternative, in failing to mandate some method insuring an impartial hearing.

We conclude that the courts of the State of Alaska have jurisdiction over this case, that Bowen was a state employee, that the State Personnel Act did not apply to him, and that his property interest in full severance pay entitled him to a hearing before his severance pay could be reduced. We affirm the superior court in all of these respects. We further conclude that Bowen has a protected liberty interest in his reputation under the Alaska Constitution, and therefore reverse that portion of the superior court's decision that held to the contrary. In all other respects, we affirm the superior court's order reversing the Department of Military and Veterans Affairs' (DMVA) decision terminating Bowen without first giving him an adversarial pretermination hearing.

II. FACTS AND PROCEEDINGS

In April 1983 Gary Bowen was appointed as an officer in the state organized militia, as defined in AS 26.05.010(b)(1), for purposes of periodic training and drill as a Judge Advocate. This is the familiar part-time duty of the National Guard. Approximately one year later, in June 1984, pursuant to 32 U.S.C. § 502(f) and Air National Guard Regulation (ANGR) 35-03, Bowen was ordered to active service in the Active Guard/Reserve (AGR). He was ordered to full-time duty with the Alaska Adjutant General under the Alaska Department of Military and Veterans Affairs to serve as the Staff Judge Advocate,

Attorney Advisor, at the headquarters of the Alaska National Guard. Bowen was periodically reappointed to this position by orders issued in April 1985, June 1988, and April 1991. Each order identified 32 U.S.C. § 502(f) and ANGR 35-03 as the authorities for the appointments; each order also stated that the duration of the appointment was as indicated "unless sooner relieved by competent authority."

In 1992 Bowen was directed to work on the implementation of the Alaska State Military Justice System. Bowen's immediate supervisor on this project was Alaska Air National Guard Colonel Jerry W. Gillean; Bowen's supervising project officer was Alaska Air National Guard Brigadier General Dan Dennis. In February 1993 Colonel Gillean notified Bowen that he had recommended to the commander of the Alaska National Guard, Adjutant General, Major General Hugh L. Cox III, that Bowen be involuntarily terminated from full-time AGR duty. Colonel Gillean cited the following reasons for this recommendation:

a. You failed to timely and properly respond to allegations of personal financial irregularities which were discovered during a security reinvestigation. As a result of these allegations your access to classified information was withdrawn on 6 November 1992. Although you knew that your supervisors considered this situation serious, you took no action to respond to their concerns until you were directed to do so on 4 Dec 92. Your response failed to produce any documentation that would have cleared up this concern. The dilatoriness of your response and the inadequacy of your answers have resulted in a breach

of trust between the leadership of the Alaska National Guard and you as our full time staff judge advocate.

b. On 19 Nov 92 you had General Cox sign a leave slip for yourself which you then failed to properly process. When you returned to work on 4 January 1993, you did not file your leave completion until I inquired into this matter with you on 21 January 93. I also requested an explanation of your failure to obtain a leave authorization number and an explanation of why you delayed in closing out the leave transaction. You have not provided me with such an explanation. You have been given a letter of reprimand for your actions in this leave incident. This misconduct has further eroded the relationship that should exist between your employer and yourself.

This notice advised Bowen that his recommended termination from full-time AGR duty would be in accordance with paragraph 6-5c of ANGR 35-03 and that under these regulations he had five work days in which to file a written response. Bowen requested and received counsel and was also given additional time to submit his response. Bowen then filed detailed written rebuttals to the above charges.

In March 1993 Bowen, through private counsel, requested a pretermination hearing to challenge the allegations. This request was promptly denied by Colonel Gillean. Gillean stated that Bowen was "not entitled to a pretermination hearing because he [had] failed to assert a protected interest," and that the procedures set out in ANGR 35-03 provided "sufficient administrative due process safeguards" for Bowen.

In early April 1993, after reviewing the responses submitted by Bowen, Colonel Gillean formally recommended Bowen's termination from his Active Guard and Reserve tour. This recommendation was forwarded with the case file to Brigadier General Kenneth M. Taylor, Jr., for review.

On April 5, 1993, General Taylor notified Bowen that he also recommended Bowen's involuntary termination from full-time AGR duty. Taylor restated Gillean's reasons for the recommended action and added a further charge:

On 13 May 92, you were tasked by Maj Gen Cox, Adjutant General Alaska National Guard, to work on the implementation of a military justice system for the state of Alaska. Through your personal dereliction and lack of initiative, a plan for a military justice system was inexcusably delayed. Your failure to perform this task, despite extensive supervision, has left the commanders assigned to the Alaska National Guard no vehicle in which to enforce discipline for an extended period of time.

In documentation running over 300 pages in length, Bowen denied all of the allegations with detailed answers and rebuttals. Bowen also denied that any of the charges against him amounted to "misconduct" or wrongdoing in any other respect.[1]

General Taylor's recommendation and Bowen's responses were sent to Brigadier General Dan E. Dennis

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[1] Bowen maintains that the regulation relied upon by the State, ANGR 35-03, fails to define "misconduct" and therefore provides no basis for termination.

for review. General Dennis concurred in the recommendation to terminate Bowen from AGR duty, which he then formally made to Adjutant General Cox.

On May 2, 1993, Adjutant General Cox denied Bowen's request for a pre-termination hearing, stating he had "reviewed AGR 35-03 and [found] this type of hearing [was] not required under that regulation." On May 3, 1993, Adjutant General Cox issued his decision on the recommendations for separation from AGR status he had received from the aforementioned subordinate officers:

1. I have carefully reviewed the Notification of Action of Involuntary Separation, dated 16 April 1993, with attachments and your response to this action.

2. I believe the preponderance of the evidence clearly supports the termination of your full-time Air National Guard duty (AGR) tour from the Alaska National Guard under paragraphs 6-5(c)(1), acts of misconduct, and 6-5(c)(2), professional dereliction, of ANGR 35-03. Bowen requested reconsideration which Adjutant General Cox denied.

On May 14, 1993, Bowen submitted a letter to the Alaska Personnel Board requesting a hearing under AS 39.25.170. This request was denied.

On May 20, 1993, the DMVA issued Special Order AGR-092 terminating Bowen's employment by order of Alaska Governor Walter J. Hickel. Bowen was then issued a Certificate of Release or Discharge from Active Duty (a Department of Defense Form 214). Bowen was sent two copies of the DD Form 214, one containing no indication of the underlying reasons for his discharge and the other

specifying an honorable discharge with reason stated as "misconduct."

Bowen appealed the termination of his AGR status to the superior court, arguing that he was entitled to a pre-termination hearing pursuant to the State Personnel Act, AS 39.25.170, and article I, section 7 of the Alaska Constitution. Bowen also argued that the denial of a pre-termination hearing deprived him of liberty and property without due process of law in violation of both the federal and state constitutions.

The superior court concluded that Bowen was deprived of a vested property interest in full severance pay and was thus entitled to a full adversarial hearing consistent with this court's holdings in *City of Ho..ıer v. State, Dep't of Nat. Resources*, 566 P.2d 1314, 1319-20 (Alaska 1977), and *Nichols v. Eckert*, 504 P.2d 1359, 1365 (Alaska 1973).[2] The superior court, however, rejected Bowen's argument that his involuntary discharge for misconduct implicates a protected liberty interest both in his reputation and his ability to gain future employment. The superior court then reversed the action of the DMVA and remanded the matter back to the DMVA for a pre-termination hearing.

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[2] The superior court reasoned that Bowen had a vested property interest in full severance pay, and because a discharge for misconduct or professional dereliction would result in the reduction of the amount of severance pay to which Bowen was otherwise entitled by almost one-half, Bowen must receive a full, adversarial hearing as delineated under the state constitution before this interest could be reduced.

Bowen requested reconsideration of the portion of the superior court's ruling that the matter be remanded to the DMVA, arguing that the DMVA had demonstrated a bias and predisposition to resolve the matter adversely to Bowen. The DMVA requested clarification of the court's order.[3] The superior court denied both motions on November 28, 1994.

This appeal and cross-appeal followed.

III. DISCUSSION

A. Standard of Review

This court exercises its independent judgment concerning questions of law raised by an administrative agency decision where there is no special agency expertise. *Phillips v. Houston Contracting, Inc.*, 732 P.2d 544, 546 (Alaska 1987); *North Slope Borough v. LeResche*, 581 P.2d 1112, 1115 (Alaska 1978).

B. Reviewability of Allegations of Deprivation of Constitutional Rights by the Military

The State argues that civilian courts should not review Bowen's allegation that he was deprived of his constitutional rights by the military because (1) the courts of Alaska do not have jurisdiction over this matter, (2) state law is pre-empted by federal law in this area, (3) such claims are nonjusticiable, and (4) Bowen did not

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[3] The State asked the court to clarify whether payment to Bowen of his full severance pay would, under the court's decision and order, render a hearing unnecessary.

exhaust his administrative remedies. We reject each of these arguments.

1. Jurisdiction

The State argues that the superior court acted beyond the jurisdiction of a state appellate court in ruling that the process mandated by federal regulation for separation of members from the AGR program and for determining eligibility for separation pay violates the due process requisites of the state constitution. The State further argues that this court would also exceed its jurisdiction if it were to uphold the decision of the superior court.[4]

The State's argument regarding jurisdiction[5] misperceives what occurred below. The superior court was not asked to rule on the constitutionality of any federal statute or of ANGR 35-03. Furthermore, the superior court did not rule that any federal statute or regulation violates the state constitution. The superior court held that, pursuant to federal law, the state constitution's due process clause must be followed before separation pay may be withheld or reduced. The court also determined that

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[4] The State cites *Kansas City Power & Light Co. v. State Corp. Comm'n*, 715 P.2d 19, 22 (Kan. 1986) (holding that if a federal statute does not violate the Constitution of the United States, it cannot be held unconstitutional on the grounds that it violates a state constitution). Kansas City Power & Light does not apply to this case because we are not addressing the constitutionality of ANGR 35-03.

[5] While denominated by the State as an argument going to jurisdiction, this is really a supremacy clause argument. For the reasons noted below, there is no supremacy clause violation here.

Bowen, as a member of the state National Guard, is a state employee. State courts have jurisdiction to decide cases regarding the discharge of members of the National Guard who are state employees. *E.g., Sorrentino v. Ohio Nat'l Guard*, 560 N.E.2d 186, 190-91 (Ohio 1990) (recognizing court's jurisdiction to decide cases regarding discharge of state National Guard members not in active federal service under modern militia system). The superior court was correct in both regards. We hold that Alaska has jurisdiction in this case.

2. Pre-emption

The State argues that Congress and the Secretary of the Air Force have acted to regulate comprehensively the administration of the AGR program in the Alaska Air National Guard, including the procedures to be followed in the case of separation, and that the states are pre-empted from applying additional and different procedures.[6] The State further argues that even where

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[6] We set out the tests for federal pre-emption in *Totemoff v. State*, 905 P.2d 954 (Alaska 1995):

> Federal law can preempt state law in three ways. First, Congress may expressly declare that state law is preempted. Second, state law is preempted if Congress intends the federal government to occupy a field exclusively. Third, federal law preempts state law if the two actually conflict. *See, e.g., Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604-05, 111 S.Ct. 2476, 2481-82, 115 L.Ed.2d 532 (1991); *English v. General Elec. Co.*, 496 U.S. 72,, 78-79, 110 S.Ct. 2270, 2274-75, 110 L.Ed.2d 65 (1990).

federal law or regulation does not comprehensively occupy the field, state law cannot stand if it conflicts with federal regulation.[7]

While the federal government might have acted to regulate comprehensively the administration of the AGR program in the Alaska Air National Guard, it has not done so. Examination of two federal laws shows this. First, 32 U.S.C. § 324(b) allows termination of a National

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Id. at 958. The State relies on only the second and third pre-emption tests set out in Totemoff. For more recent discussions of the pre-emption doctrine, *see State v. Arnariak*, 941 P.2d 154 (Alaska 1997).

[7] In response, Bowen maintains that the doctrine of "federal pre-emption" only applies where federal courts are granted exclusive jurisdiction over a federal cause of action to the exclusion of any state court. Bowen argues that the general rule is that state courts are considered presumptively competent to adjudicate issues and claims arising under federal law, citing *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 823 (1990).

Bowen's argument is not responsive to the State's argument. The State's argument goes to the power of the State to legislate or pass regulations either at all or in conflict with the federal laws and regulations. Bowen's response concerns the jurisdiction of state courts, another aspect of pre-emption and one which the State does not argue here.

In summary, there are some areas of federal law in which the states may not legislate or regulate but state courts may adjudicate the disputes which arise under federal law. The State takes the position that this case fits in this category. There are other areas of federal law where the states not only may not legislate or regulate, the state courts may not adjudicate. Bowen argues that the State claims that this is such an area. The State has not made that argument.

Guard officer "as provided by the laws of the State."[8] Congress has chosen to affirm, rather than abridge, the states' role in terminating officers of their National Guards. This is clear recognition that state law may provide additional termination requirements.

Second, analysis of ANGR 35-03 shows that the regulation was drafted with the applicability of state laws in mind. Chapter 6, section 6-5(a) of the regulation provides in relevant part that personnel will be involuntarily removed from full-time National Guard duty only IAW [in accordance with] procedures prescribed herein and only after the state Adjutant General determines that all applicable laws and regulations have been complied with. (Emphasis added.) Given that termination of a National Guard officer may only be "as provided by the laws of the State" under 32 U.S.C. § 324(b), and given that the Adjutant General must determine that all applicable laws have been complied with, it is clear that applicable

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[8] The statute provides in relevant part that

> the appointment of an officer of the National Guard may be terminated or vacated as provided by the laws of the State or Territory of whose National Guard he is a member. . . .

(Emphasis added.) Emphasizing the role of the states in procedures involving termination of National Guard officers, 32 U.S.C. app. § 1101.5 (National Guard Regulations) provides in part:

> Termination of appointments and withdrawal of Federal recognition – (a) Authority
>
> The termination of the appointment of a commissioned officer of the National Guard is a function of the State authorities.

state constitutional provisions must be enforced in the termination process.[9] Nothing in the federal statute or regulations appears to disallow the application of state constitutional requirements in addition to the procedures set out in ANGR 35-03; indeed, the statute and regulations invite state law participation in the termination process. We therefore conclude that Congress has neither expressly nor impliedly pre-empted state law in this field.

Only one termination procedure exists, which eliminates the possibility of conflicting decisions. Given the language in ANGR 35-03 and 32 U.S.C. § 324, there is no inherent conflict between the termination procedures set forth in ANGR 35-03 and additional state constitutional procedural safeguards. In short, there is no conflict with federal law. Therefore, we conclude there is no federal pre-emption and affirm the ruling of the superior court.

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[9] It should also be noted that ANGR 35-03, Chapter 1, section 1-4 allows the state Adjutant General to supplement the regulation "provided the specific requirements herein are not abridged." The addition of a requirement of a hearing does not in any way abridge any of the specific requirements of ANGR 35-03, section 6-5 (Separation for Cause and Procedure). Rather, it supplements them. The state Adjutant General, who under ANGR 35-03, section 1-4, "is authorized to issue supplements" to the regulation, is not prohibited by the regulation from following state constitutional requirements as well as the regulation.

3. Justiciability

The State argues that AGR separation and separation pay issues are nonjusticiable.[10] The State cites a test adopted in *Christoffersen v. Washington State Air Nat'l Guard*, 855 F.2d 1437, 1442 (9th Cir. 1988).[11] We decline to

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[10] Nonjusticiability claims are most often raised in the context of "political questions," about which we have said: "[t]here are certain questions involving coordinate branches of the government, sometimes unhelpfully called political questions, that the judiciary will decline to adjudicate." *Abood v. Gorsuch*, 703 P.2d 1158, 1160 (Alaska 1985). As we noted in *Abood v. League of Women Voters*, 743 P.2d 333 (Alaska 1987), "[i]t is not possible to draw the exact boundary separating justiciable and nonjusticiable questions." *Id.* at 336. This conclusion rested on *Poe v. Ullman*, 367 U.S. 497 (1961). In his plurality opinion, Justice Frankfurter wrote:

> Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision . . . and the actual hardship to the litigants of denying them the relief sought.

Id. at 508-09. The United States Supreme Court has identified a number of elements, one or more of which is "[p]rominent on the surface of any case held to involve a political question." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Of the elements identified by the Supreme Court, the only one even arguably present in this case is "the impossibility of a court's undertaking independent resolution [of the case] without expressing lack of the respect due coordinate branches of government." *Id.* For the reasons set out in the text, we conclude that this element is not in fact present here.

[11] Under this test, review of internal military decisions requires, first, an allegation that a recognized constitutional right has been violated and a showing that all intraservice remedies have been exhausted. If these prerequisites are met,

apply the Christoffersen test because Bowen is a state employee, not a federal employee. Furthermore, the question whether deprivation of property rights by an Alaska administrative agency is sufficient to invoke constitutional due process is not one of military expertise or one which causes interference with the military mission.[12]

This court is not being called upon to intrude into any issues of military doctrine or other matters committed to the expertise of military commanders. Rather, we are asked to review the decision of the superior court that analyzed the actions of the DMVA and determined that it transgressed the constitutional rights of one of its employees. We therefore hold the issues on appeal in this case are justiciable.

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four additional factors must be weighed. Then, only if the balance favors court interference, will review be undertaken. *Christoffersen*, 855 F.2d at 1442.

[12] It is within the province of this court to determine constitutional issues and deprivation of constitutional rights. *See Kiester v. Humana Hosp. Alaska, Inc.*, 843 P.2d 1219, 1223 (Alaska 1992) (holding court would determine whether the procedures employed by hospital conformed to Alaska Constitution and were in accordance with basic principles of fairness and due process of law); *see also Emory v. Secretary of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987) ("The military has not been exempted from constitutional provisions that protect the rights of individuals. . . . It is precisely the role of the courts to determine whether those rights have been violated."); *Dillard v. Brown*, 652 F.2d 316, 319-20 (3d Cir. 1981) (upholding justiciability of sex discrimination and constitutional privacy claims brought by female enlistee who was discharged from New Jersey National Guard because constitution does not prevent a federal court from entertaining an appropriate constitutional claim brought against the military).

4. Exhaustion of Administrative Remedies

The State argues that in concluding that Bowen was entitled to an adversarial hearing under state law before his separation pay could be reduced, the superior court overlooked Bowen's failure to exhaust his intraservice administrative remedies in this regard. The State contends that Bowen could have sought relief from the Air Force Board for Correction of Military Records (AFBCMR) under 10 U.S.C. § 1552 and 32 C.F.R. § 865.1 et seq. The State asserts that the AFBCMR is available, upon application by a member of the National Guard, to review a nonretention decision on a claim that it was the result of error or injustice and to correct the member's records and reinstate pay and other federal compensation or benefits that were lost.

This issue not having been properly raised before the superior court, we will not consider it on appeal.[13] We have previously held:

> Waiver in superior court may occur either in a suit initiated there, or when the superior court is reviewing agency action. In agency review, an

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[13] Bowen also argues that Boards for Correction of Military Records of the various armed services are inappropriate to determine constitutional claims. *See Glines v. Wade*, 586 F.2d 675, 678 (9th Cir. 1978), *rev'd on other grounds*, 444 U.S. 348 (1980) ("Resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board.") (quoting *Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973)); *but see Guerra v. Scruggs*, 942 F.2d 270, 273 (4th Cir. 1991) ("The ABCMR has authority to consider claims of constitutional. . . . violations.").

issue may be abandoned on appeal to the superior court, either by failing to include it in the points on appeal or by inadequate briefing. *Nenana City Sch. Dist. v. Coghill*, 898 P.2d 929, 934 (Alaska 1995) (citation omitted). *See also Zeman v. Lufthansa German Airlines*, 699 P.2d 1274, 1280 (Alaska 1985) ("As a general rule, a party may not present new issues or advance new theories to secure a reversal of a lower court decision.") (citing *O'Neill Investigations, Inc. v. Illinois Employers Ins. of Wausau*, 636 P.2d 1170, 1175 n.7 (Alaska 1981)); *Williams v. Alyeska Pipeline Serv. Co.*, 650 P.2d 343, 351 (Alaska 1982) (holding argument not raised before superior court will not be considered on appeal).

The State concedes that it did not raise this issue specifically before the superior court, but contends that its arguments before the court specifically and impliedly urged deference to the existing military administrative process and avoidance of judicial interference. The State asserts that this is a central theme of the exhaustion principle. Citing this court's adoption of a "liberal approach" in determining whether an issue was raised in the superior court,[14] the State submits that the exhaustion issue should not be deemed waived.

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[14] The State cites to *Zeman*, 699 P.2d at 1280, where this court stated that if arguments (1) are not dependent on new facts, (2) are closely related to [the party's] trial pleadings and (3) could have been gleaned from the pleadings . . . [t]he appellant need not have expressly presented every theory supporting an argument before the trial court, but can expand or refine details of an argument otherwise preserved on appeal.

In its brief before the superior court the State argued the following:

> A. Major Bowen Was Not a State Employee.
>
> B. If Major Bowen Is Not a State Employee, Then His Employment Is a Federal Matter and Beyond the Jurisdiction of This Court.
>
> C. Regardless of Who the Employer Was, the Employment Contract Made Federal Regulations Applicable to Major Bowen's Employment.
>
> D. Federal Law Governs the Right to and Nature of Any Hearing.
>
> E. The Procedures in ANGR 35-03 Satisfy the Requirements of Due Process.

Obviously, none of these arguments included a claim that Bowen failed to exhaust his administrative remedies. Additionally, we have reviewed the entire text of each argument set out under each of these headings. None raises the issue of exhaustion of administrative remedies. Even when viewing the State's pleadings before the superior court liberally, there is no allegation whatsoever of the issue now argued before this court. Therefore, we hold that this issue was waived because the State failed to include it in its brief to the superior court. *Nenana City Sch. Dist.*, 898 P.2d at 934.

C. Separation Pay

1. Whether Bowen has a property interest in full separation pay

As a State employee under the National Guard AGR program, Bowen's pay was federally funded under 32 U.S.C. § 502(f). Upon his termination he was entitled to severance pay under Department of Defense Pay Manual (DoDPM), Chapter 4, Section B, 40411a. Once DMVA determined that Bowen was guilty of "misconduct," however, his severance pay was reduced by one-half and he lost severance pay in the approximate amount of $37,030. *DoDPM*, Chapter 4, Section B, 40411b.

The superior court found that property interests protected under Alaska's due process clause are defined by existing state laws, rules, or customs. The superior court relied on *Breeden v. City of Nome*, 628 P.2d 924, 926 (Alaska 1981) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)), in which this court stated:

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[15]

The superior court found that where pay manuals define the amount of separation pay due an employee

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[15] In *Breeden*, this court held that a city employee's contractual right to a thirty-day notice of termination created a protected property interest. *Id.* at 926.

upon involuntary discharge, the employee has a legitimate expectation of a certain amount of such pay upon involuntary termination. The court concluded that Bowen established a protected property interest in such pay.

The State contends that Bowen does not have a property interest in full separation pay. The State maintains that separation pay for an AGR member is only payable upon the member being involuntarily released before the scheduled end of a tour, and then it is only available to those who meet the eligibility requirements outlined in DoDPM. The State argues that a member with AGR status cannot place any reasonable reliance upon a benefit that becomes available only in the event that the member is ordered out of the program before his or her tour comes to an end.

The State also points to DoDPM Chapter 4, Section B, 40412, entitled "Limitations of Eligibility":

> Service members separated under the following circumstances are not eligible for separation pay:
>
> . . . .
>
> 1. A determination is made by the secretary concerned in an extraordinary case that the conditions under which the member is separated do not warrant separation payment. This authority is not to be delegated. It is intended that this discretionary authority to deny payment will be used sparingly.

The State then argues that nothing in the DMVA's regulatory scheme vests Bowen with a right to separation pay.

Bowen maintains that DMVA's determination that he committed acts of misconduct without affording him the opportunity to challenge that accusation, resulting in a loss of $37,030 in separation pay, was a deprivation of a property interest without due process of law.

In our view the fact that separation pay is payable only upon involuntary separation and that there are certain defined situations, such as Bowen's, where it can be reduced or in an "extraordinary" case eliminated does not diminish an employee's legitimate expectation of separation pay upon involuntary termination. Separation pay is a concept defined in DoDPM, Chapter 4, Section B, and the DoDPM rules define the amount of separation pay due an employee. Simply because some involuntarily separated employees may receive less than full separation pay based on a specific finding by the DMVA warranting the decrease under the DoDPM rules, it does not follow that such employees did not have a legitimate expectation of a certain amount of separation pay upon involuntary termination. Nor does it support the conclusion that the pay may be diminished or eliminated in an unfair manner.

As to the process which was provided to Bowen, his request for a pre-termination hearing was denied, as was his request for reconsideration. Thus, Bowen was provided no opportunity for a hearing before his separation pay was reduced.

We conclude, as the superior court did, that Bowen was deprived of a vested property interest in full severance pay and was entitled to a full adversarial hearing consistent with this court's holdings in *City of Homer*, 566

P.2d at 1319-20 and *Nichols*, 504 P.2d at 1365. Bowen was not afforded such a hearing before the deprivation of his severance pay, and thus Bowen was not provided due process under the Alaska Constitution.

We therefore affirm this legal conclusion of the superior court and hold that Bowen has a property interest in full separation pay entitled to due process protection.

2. Whether sufficient due process to protect Bowen's property interest is provided in the intraservice remedies available to him

The State argues that even if full separation pay is a benefit entitled to due process protection, Bowen's ability to pursue his eligibility for full separation pay through either the AFBCMR or the Air Force Discharge Review Board is a remedy sufficient to satisfy due process in these circumstances. The State failed to make this argument before the superior court.[16] On this basis alone, we reject this argument. *See supra* pp. 17-19. Moreover, courts have questioned the appropriateness of leaving to administrative agencies the resolution of constitutional claims. *See supra* n.13.

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[16] Although the State argued before the superior court that the requirements of due process had been satisfied, this argument referred only to the procedures in ANGR 35-03. The State did not argue due process was satisfied by virtue of the existence of the AFBCMR or the Air Force Discharge Review Board.

D. Whether Bowen Is a State Employee and Whether He Is Entitled to the Protections of the Alaska Personnel Act

Bowen, a staff judge advocate serving in the AGR program, was a state employee and a member of the Alaska National Guard subject to state National Guard statutes and regulations. *See U.S. ex rel. Karr v. Castle*, 746 F. Supp. 1231, 1237 (D. Del. 1990), *withdrawn in part*, 768 F. Supp. 1087 (D. Del. 1991), *aff'd sub nom. U.S. v. Carper*, 22 F.3d 303 (3d Cir. 1994) ("The intent of Congress was, and is, that National Guard personnel serving in the 'Full-Time Manning Program' now included in a DOD program called Active Guard and Reserve (AGR) serve under 32 U.S.C. § 502(f) in conventional National Guard status, i.e., under State control as opposed to service in the active military service of the United States in Reserves of the Army or Reserves of the Air Force status.") (quoting H.R. Rep. No. 943, 97th Cong., 2d Sess. 31 (1982)). As the Supreme Court observed in *Maryland v. United States*, 381 U.S. 41, 48 (1965), *remanded on other grounds*, 382 U.S. 159 (1965):

> It is not argued here that military members of the Guard are federal employees, even though they are paid with federal funds and must conform to strict federal requirements in order to satisfy training and promotion standards. Their appointment by state authorities and the immediate control exercised over them by the States make it apparent that military members of the Guard are employees of the States, and so the courts of appeals have uniformly held.

(Emphasis added.)

The determination that Bowen is a state employee does not end the inquiry, however. Alaska Statute 26.05.060 specifies what statutes and regulations apply to members of the Alaska National Guard:

> The governor as ex officio commander of the militia of the state has command of the Alaska National Guard and the Alaska Naval Militia while they are not in active federal service. The governor may adopt necessary regulations for them not inconsistent with 48 U.S.C. § 473-479. Except as otherwise prescribed by those sections, the Alaska National Guard and the Alaska Naval Militia and their members are subject to all federal laws and regulations relating to the National Guard and Naval Militia of the several states and the territories and of the United States.

See also AS 26.05.340.[17] Although it has had the power to do so, Alaska has not adopted any regulations concerning the organization, administration or management of state National Guard personnel.

Air National Guard Regulation 35-03 "prescribes policy and procedures for administering and managing full-

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[17] Alaska Statute 26.05.340(d) provides:

> All matters relating to the organization, discipline and government of the National Guard or Naval Militia, not otherwise provided for by the laws of the United States, this chapter, or regulations adopted by the president shall be governed by regulations adopted by the adjutant general and approved by the governor, and the regulations when adopted, have the same force and effect as though enacted in this chapter.

time National Guard personnel serving in the full-time military duty program under 32 U.S.C. § 502(f)" that were in effect during Bowen's tour of duty.[18] ANGR 35-03, Chap. 1, § 1-1. Chapter 6, section 6-5d of ANGR 35-03 sets forth the procedure for involuntary termination. That section contains no provision for a pretermination hearing.

Alaska Statutes 26.05.060 and 26.05.340 specifically provide that Alaska National Guard personnel are subject to the federal laws and regulations relating to the National Guard and any supplemental regulations adopted by the Alaska Adjutant General and approved by the Governor. No such regulations have been adopted. Because no statute or regulation has been adopted which applies the Alaska Personnel Act to termination of a member of the state National Guard, the hearing protections set forth in the Alaska Personnel Act do not apply to Alaska National Guard personnel.

We further hold that ANGR 35-03, Chapter 6, Paragraph 6-5a, does not mandate that Bowen's involuntary separation comport with all aspects of Alaska state law. The regulation states only that "the state Adjutant General [must] determine[ ] that all applicable laws and regulations have been complied with." (Emphasis added.) By virtue of the failure of the state to adopt regulations which would apply the Alaska Personnel Act to military

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[18] ANGR 35-03 was superseded by Air National Guard Instruction (ANGI) 36-101, effective December 29, 1993. Bowen's involuntary separation occurred in May 1993, while ANGR 35-03 was still in effect, and it is that regulation that applies to this case.

personnel, as it might have done under AS 26.05.060 and AS 26.05.340 but did not do, we conclude that the personnel act is not applicable to Bowen.

Finally, we disagree with Bowen's contention that the failure to list military employees in AS 39.25.110's list of state employees who are exempt from the personnel act means that the act applies to Bowen. The statute is not an exhaustive list of exempt employees. The statute provides in relevant part:

> Unless otherwise provided by law, the following positions in the state service constitute the exempt service and are exempt from the provisions of this chapter and the rules adopted under it. . . . Thus, exempt status may be derived from provisions of law other than AS 39.25.110. Because the Alaska legislature adopted federal personnel rules and regulations regarding promotion and separation in the Alaska National Guard, it "otherwise provided by law" that Alaska National Guard members were exempt, and thus excluded from the provisions of the Alaska Personnel Act.

We conclude that in the absence of any supplementary regulation pursuant to AS 26.05.060 or AS 26.05.340, the state has adopted federal law and regulation, specifically ANGR 35-03, as setting forth the policies to be followed for administering and managing full-time National Guard personnel. Therefore, we hold that the language of ANGR 35-03, Chapter 6, Paragraph 6-5a, does not cause the Alaska Personnel Act to be applicable to National Guard personnel.

We therefore affirm the holding of the superior court that Bowen is not entitled to the protections of the Alaska Personnel Act.

E. Whether Bowen Has a Due Process Right to a Hearing under Article I, Section 7 of the Alaska Constitution

Article I, section 7 of the Alaska Constitution provides in part:

> No person shall be deprived of life, liberty or property without due process of law. . . .

This court held in *Nichols*, 504 P.2d at 1362, that for the right to due process to attach, there must be a "state action and deprivation of an individual interest of sufficient weight to warrant constitutional protection." Accordingly, the question in this case is whether Bowen was deprived of a protected liberty interest without due process of law by being denied a pre-termination administrative hearing.

Bowen asserts that he was so deprived. He argues that "[t]he liberty interest requiring a pretermination due process hearing applies any time the government takes action against a public employee by leveling serious charges causing a stigma or other disability to arise against the employee thus foreclosing the employee's freedom to take advantage of other employment opportunities."

Bowen maintains that every time he seeks future employment or attempts to pursue his chosen profession, the practice of law, he may be obliged to explain why a

previous termination of employment was for acts of "misconduct." This argument has merit. Although Bowen was provided with two copies of his DD Form 214, one which contained no information concerning his discharge and one which stated that he had been honorably discharged for "misconduct," Bowen could still be asked the reasons for his discharge. Furthermore, the "sanitized" copy of his DD Form 214 does not list any information whatsoever concerning Bowen's discharge, which would very likely prompt questions on the subject during future employment interviews.

Additionally, in today's sophisticated market place, it is reasonable to conclude that prospective employers understand the language and importance of a DD Form 214. *See Casey v. United States*, 8 Cl. Ct. 234, 242-43 (1985) (prospective employers know and understand the coded designators used on DD-214's and routinely ask discharged servicemen for the forms, "[t]hus, stigmatizing and derogatory information must only be given to servicemen who have been afforded elementary due process rights").

The cited reason for Bowen's discharge, "misconduct," is sufficiently stigmatizing to implicate a liberty interest triggering due process protection in these circumstances. General allegations of misconduct are sufficiently damaging to the reputation of a military employee and an attorney to implicate that employee's liberty interest. We therefore hold that Bowen is entitled to a pretermination administrative hearing under article I, section 7 of the

Alaska Constitution, as to his reputation interest in addition to his interest in full severance pay.[19]

F. Whether Bowen Is Entitled to a Trial De Novo or a Hearing outside the Auspices of the DMVA

The superior court held that given Bowen's protected property interest in full severance pay, he was entitled to a pretermination adversarial hearing under *City of Homer*, 566 P.2d at 1319-20, and *Nichols*, 504 P.2d at 1365.

Bowen requested reconsideration of the portion of the superior court's order remanding the case to the DMVA for hearing, arguing that "[t]he undeniable fact is that Bowen cannot receive anything resembling a fair and impartial hearing from any organization, group, board or panel appointed under the control and auspices of the Department of Military and Veteran's Affairs or Alaska National Guard." Bowen appeals from the superior court's denial of reconsideration.

Bowen's charge of bias on the part of the DMVA and the Alaska National Guard is not established by the record. Consequently, there is no basis for his claim of entitlement to a trial de novo. We therefore affirm the order of the superior court and deny Bowen's request for

---

[19] The superior court concluded that Bowen did not have a property interest in continued employment, and Bowen attacks this determination on appeal. We decline to review this question, because our decision that he was deprived of a protected liberty interest in his reputation and must be afforded a hearing on that issue makes this issue moot.

a trial de novo. Bowen may, however, make interim application to the superior court for further relief, once the procedure for his hearing is set by the DMVA, upon a showing that the procedures established by the DMVA are unfair.

IV. CONCLUSION

For the reasons set out above, we AFFIRM the superior court's determinations that Alaska courts have jurisdiction of this dispute, that Bowen was a state employee, that the Alaska Personnel Act did not apply to him, and that his protected property interest in full severance pay was violated without due process under the Alaska Constitution. We therefore AFFIRM the superior court's order reversing the DMVA's decision to terminate Bowen's employment without first giving him a pretermination hearing, and we AFFIRM the superior court's determination that a trial de novo is not required. Having concluded that Bowen had a liberty interest in his reputation under the Alaska Constitution, we REVERSE that portion of the superior court's opinion which held to the contrary. We REMAND the matter to the superior court for remand to the DMVA for a pretermination hearing.

APPENDIX E

EXCERPTS OF CORRESPONDENCE

The relevant portions of a letter from Richard K. Willard, Assistant Attorney General (Civil), U.S. Department of Justice to Maj. General John L. France, The Adjutant General, State of Colorado dated Jan 12, 1988, regarding federal representation of full-time Colorado National Guard personnel, provide in pertinent part:

> *" . . . full-time National Guard recruiters called to active duty pursuant to 32 U.S.C. § 502(f), such as the defendants in this case, have been statutorily defined by Congress to be state rather than federal employees. Thus, a full-time National Guard recruiter is on full-time National Guard Duty, and is not on 'active military service of the United States.' 32 U.S.C. § 101(12) . . . id § 101(19) . . .*
>
> *"Because Congress has stated that full-time National Guard recruiters are not federal employees, there is no basis to change the Civil Division's original determination to deny the recruiters' request for representation, pursuant to 28 C.F.R. § 50.15(a)(2)."*

The relevant portion of a Memorandum from James E. Hise, Chief Counsel, National Guard Bureau, Departments of the Army and Air Force, Dated 6 August 1990, Regarding Correspondence with Offices of the Judge Advocates General of the Air Force and Army provides in pertinent part:

> *"Pursuant to 10 USC § 3040, 'The National Guard Bureau is the channel of communication between the departments concerned' (the Department of the Army and the Department of the Air Force) 'and the several States, Territories . . . on all*

matters pertaining to the National Guard.' All National Guard Judge Advocates are reminded that correspondence and communications with the Offices of the Judge Advocates General of the Air Force and Army, including their respective schools should be routed through the office of the Chief Counsel, NGB-JA."

The relevant portions of a letter from Col. Brad Farber, Bureau Judge Advocate, The National Guard Bureau, Departments of the Army and the Air Force, to Milford H. Knutson, Esq., dated March 22, 1993 provide in pertinent part:

. . . "I am also unable to take action to recind the recommendation for relief in Major Bowen's case. Relief from the AGR program is strictly a state matter, governed by the provision of Air National Guard Regulation 35-03. No existing statute or regulation gives any portion of the National Guard Bureau the authority to intervene in these actions. Therefore, any recission such as you request would have to come from officials of the Alaska National Guard." . . .

The relevant portions of a memorandum from Major General Hugh L. Cox III, Adjutant General, Headquarters, Alaska National Guard, to Department of the Air Force, Office of the Judge Advocate General, dated November 3, 1993, regarding Representation of the Alaska National Guard in Gary W. Bowen's Alaska State Court Action, provide in pertinent part:

"Captain Watson advised my Staff Judge Advocate, Major Musick, that the National Guard Bureau will not become involved in this matter. . . . The Alaska Attorney General's office is currently representing the Guard, but has indicated if there is an

adverse judgement they intend to present it to the federal government for payment." . . .

The relevant portions of memorandum from Col. Raul F. Barbara, Chief, Litigation Division, Air Force Legal Services Agency, to NGB-JA (Col Farber regarding federal represention of the Alaska National Guard, dated 16 Dec. 1993, provide in pertinent part:

"We have reviewed the request for federal representation in Bowen v. State of Alaska et al. The Department of Justice (DOJ) has no authority to represent a state or state agency, simply on the basis that a federal interest may be involved." . . .

The relevant portions of a memorandum from Col. Brad Farber, Bureau Judge Advocate, National Guard Bureau, Departments of the Army and Air Force, to The Adjutant General, Alaska National Guard, regarding the request for federal representation, provide in pertinent part:

"Forwarded for you (sic) information and action is the response received by this office concerning your requests for federal representation in the Bowen case. As you can see, Air Force Litigation Division will not support your request." . . .

The relevant portions of a memorandum from Col. Brad Farber, Bureau Judge Advocate, National Guard Bureau, Departments of the Army and Air Force, to Col. Jerry W. Gillean, dated "22 Jan 1992" regarding "Request for Legal Advice Regarding Maj. Gary W. Bowen", provide in pertinent part:

" . . . therefore, the state National Guard, not the National Guard Bureau, has the responsibility for administering matters such as the personnel issues presented in your request. . . .

> *"Finally, we believe that you have access to legal advisory resources. As a state agency, the National Guard should have access to legal advice and services from the state Attorney General."* . . .

The relevant portions of a letter from Col. Brad Farber, Bureau Judge Advocate, National Guard Bureau, Departments of the Army and Air Force, to Major Gary W. Bowen, dated 31 October, 1994, regarding complaints for wrongs under Article 138, UCMJ, provide in pertinent part:

> *"According to records maintained in the Personnel Directorate, Air National Guard Readiness Center (ANGRC/DP), you are serving as a traditional guard member. As such, you are not in federal service and are not subject to the UCMJ. Therefore, Article 138 UCMJ, is not available to you."* . . .

APPENDIX F

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Article 1, Section 8, of the United States Constitution provides, in pertinent part: "The Congress shall have the power . . . To provide for organizing, arming, and disciplining the Militia, and for *governing such part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the authority of training the Militia . . .* ". (Emphasis supplied)

The Eleventh Amendment to the United States Constitution provides in pertinent part: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state . . . ".[1]

10 U.S.C. § 10110 provides in relevant part: "The Air Force Reserve is a reserve component of the Air Force to provide a reserve for active duty. It consists of the members of the officer's section of the Air Force Reserve and of the enlisted section of the Air Force Reserve. It includes all Reserves of the Air Force *who are not members of the Air National Guard of the United States.*" (Emphasis supplied).

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[1] Although the literal language of the Amendment is not a bar to suit by a citizen against his own state, it has been so interpreted. *Employees of the Department of Public Health & Welfare, State of Missouri, et al. v. Department of Public Health & Welfare, State of Missouri, (1973)* 411 U.S. 279, 36 L.Ed.2d 251, 93 S.Ct. 1614.

10 U.S.C. § 8379 provides in pertinent part: "Notwithstanding any other provision of this chapter [10 U.S.C. §§ 8351 et. seq.], the appointment of commissioned officers of the Air National Guard is a function of he governor or other appropriate authority of the jurisdiction concerned."

10 U.S.C. § 10113 provides in pertinent part: "When not on active duty, members of the Air National Guard of the United States shall be administered, armed, equipped, and trained in their status as members of the Air National Guard.

10 U.S.C. § 12401 provides in pertinent part: "Members of the Army National Guard of the United States and the Air National Guard of the United States are not in active federal service except when ordered thereto under law.

10 U.S.C. § 12403 provides in pertinent part: "Members of the Army National Guard of the United States ordered to active duty shall be ordered to duty as Reserves of the Army. Members of the Air National Guard of the United States ordered to active duty shall be ordered to duty as Reserves of the Air Force."

10 U.S.C. § 12405 provides in pertinent part: "members of the National Guard called into Federal service are, from the time when they are required to respond to the call, subject to the laws and regulations governing the Army or Air Force, as the case may be, except those applicable only to the members of the Regular Army or Regular Air Force, as the case may be."

32 U.S.C. § 324(b) provides in pertinent part: "The Appointment of an officer of the National Guard may be terminated or vacated as provided by the laws of the State or Territory of whose National Guard he is a member. . . . "

32 U.S.C. § 325 provides in pertinent part: "(a) Each member of the Army National Guard of the Air National Guard of the United States who is ordered to active duty is relieved from duty in the National Guard of his State of Territory, or of Puerto Rico or the District of Columbia, as the case may be, from the effective date of his order to active duty until he is relieved from that duty." . . .

ANGR 35-03, Ch 6, § 6-5(a) provides in pertinent part: " . . . personnel will be involuntarily removed from full time National Guard duty only IAW [in accordance with] procedures prescribed herein and only after the *state* Adjutant General determines that *all applicable laws and regulations have been complied with.*" (Emphasis supplied)

32 Code of Federal Regulations § 564.52(b) provides in pertinent part: " . . . in accordance with general principles of law, the National Guard and the Air National Guard when not in federal service are not agencies of the United States and the United States is not liable for injury or damages arising from their activities . . . ".

32 U.S.C. § 101(12) provides in pertinent part: " 'Active duty' means full-time duty in the active military service of the United States. . . . It does not include full-time National Guard duty."

32 U.S.C. § 101(19) provides: " 'Full-time National Guard duty means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of this title for which the member is entitled to pay from the United States or for which the member has waived pay from the United States."

32 *Code of Federal Regulations* § 564.52(b) provides in pertinent part: " . . . in accordance with general principles of law, the National Guard and the Air National Guard when not in federal service are not agencies of the United States, and the United States is not liable for injury or damage arising from their activities. Thus, claims for such injury or damages are not cognizable under the Federal Tort Claims Act, as revised and codified (62 Stat. 982, 28 U.S.C. 3671-80). By the statutory provisions referred to in paragraph (a) of this section, the United States assumes an obligation to settle administratively limited classes of claims relating to activities of the National Guard and the Air National Guard."

ANGR 110-6 provides in pertinent part: 6a. "Full-time AGR Judge Advocate officers will be in full-time AGR status under 32 U.S.C. 502(f)." . . . 8b. "The Office of Chief Counsel, National Guard Bureau, will be advised promptly by the State Adjutant General of any activities or proceedings (military or civilian) that involve an alleged violation of professional standards of conduct by a full-time AGR Judge Advocate in the State that should

be referred through channels to the Army Professional Responsibility Committee or the Air Force TJAG's Ethics Panel."

ANGR 35-03 para. 3-3b reads: "When called or ordered to federal active duty with their ANG unit, full time military duty personnel must be terminated from 32 USC 502(f) status. Appropriate Title 10 USC orders will be published."

ANGR 35-03 paragraph 8-10(d) Provides in pertinent part: "Personnel who are within two years of qualifying for retirement under the provisions of 10 U.S.C. 8911 or 8914, and who have not passed, or will not pass their mandatory separation date before completing 20 years of active duty, will not be involuntarily separated from full time military duty without the approval of the Secretary of the Air Force."

Alaska Statutes (A.S.) 26.06.030 provides in pertinent part: " . . . (a) The Alaska National Guard consists of . . . commissioned officers and warrant officers who are citizens of the United States, having the qualifications prescribed by federal law and regulations, and who are appointed and commissioned by the governor." . . .

Alaska Statutes 26.05.060 provides in pertinent part: "The governor as ex officio commander of the militia of the state has command of the Alaska National Guard and the Alaska Naval Militia while they are not in active federal service. The governor may adopt necessary regulations for them not inconsistent with 48 U.S.C. 473-479. Except as otherwise prescribed by those sections, the Alaska National Guard and the Alaska Naval Militia and

their members are subject to all federal laws and regulations relating to the National Guard and Naval Militia of the several states and territories and of the United States.

Alaska Statutes 26.05.200 provides in pertinent part: "A person may not be commissioned or warranted in an office of the National Guard or the Naval Militia of the State unless the person is examined and adjudged qualified for the office by an examining board appointed by the commander in chief, except that *at the discretion of the adjutant general the proceedings of federal examining boards may be accepted instead of a state board.* The composition, appointment and the procedure of examining boards and the nature and scope of examinations shall be prescribed by the military laws or regulations of the United States *or this state.*" (Emphasis supplied)

Alaska Statutes 26.05.300 provides in pertinent part: "An offense committed by a member of the militia, organized or unorganized, shall be tried in civil courts and prosecuted by civil authorities except for offences of a purely military nature. This policy shall be executed and carried into effect at all time and applies to all encampments, armory drill periods, and parade periods in addition to any duty performed by the militia . . . ".

The Fifth Amendment of the United States Constitution provides, in pertinent part: "No person shall . . . be deprived . . . of property, without due process of law. . . . "

(2)

Supreme Court, U.S.
FILED
MAY 22 1998
OFFICE OF THE CLERK

No. 97-1731

In The

Supreme Court of the United States

October Term, 1997

GARY W. BOWEN,

Petitioner,

v.

KEITH OISTEAD; UNITED STATES OF AMERICA; HUGH L. COX III; DAN E. DENNIS; KENNETH M. TAYLOR; STATE OF ALASKA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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20 pp

QUESTIONS PRESENTED

1. Whether the Ninth Circuit Court of Appeals erred in holding that the doctrine of intra-military immunity and nonjusticiability, deriving from this court's opinion in *Feres v. United States*, 340 U.S. 135 (1950), required dismissal of petitioner's suit for damages brought against the Alaska National Guard and petitioner's superior officers in the Alaska National Guard.

2. Whether the District Court, and the Court of Appeals, lacked jurisdiction over the claims in Bowen's complaint against the Alaska National Guard and Bowen's superior officers in the Alaska National Guard.

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STATEMENT OF FACTS AND PROCEEDINGS BELOW

A. Facts

In June, 1984, Gary Bowen was appointed to full time duty with the Alaska Air National Guard in an Active Guard/Reserve ("AGR") position. In this position he was tasked to perform the duties of staff judge advocate at the Headquarters of the Alaska National Guard. Over time Bowen achieved the rank of Major in this position. His status in the AGR program was last continued (by orders dated in April, 1991) to June 3, 1996 "unless sooner relieved by competent authority." He was "relieved" by the Adjutant General of the Alaska National Guard and terminated from his AGR position in May of 1993.

The AGR program is authorized by act of Congress in 32 U.S.C. § 502(f). This statute allows a member of the National Guard to be ordered to full-time duty above and beyond the part-time duty normally required of a regular member of the National Guard.[1] The statute mandates, however, that the appointment be made pursuant to "regulations . . . prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be . . . " *Id.* The Secretary of the Air Force through the promulgation of Air National Guard Regulation 35-03 has prescribed detailed rules governing AGR status. ANGR 35-03 (June

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[1] Regular members of the state National Guard serve only part-time, assembling on weekends (up to 48 times in a year) and participating in training exercises at least 15 days in a year. 32 U.S.C. § 502(a). The AGR program was created to provide full-time military support personnel to assist in the administration of the state National Guard. Petitioner's Appendix 3

1989). Among other things, members of the program are paid by the federal government through the Joint Uniform Military Pay System (JUMPS), they are precluded from receiving state pay or benefits and they are limited in the time and circumstances under which they may be placed on active duty for the state. *Id.* Portions of this regulation also deal comprehensively with the separation-termination of AGR personnel. *Id.*

Additionally, the Department of the Army and the Air Force, have jointly promulgated regulations articulating more specifically the mission and functions of officers, like Bowen, who are in the full-time AGR Judge Advocate Program. According to these regulations,

> The primary mission of full-time AGR Judge Advocates . . . is to provide legal advice and services to the State Adjutants General and their staffs, subordinate ARNG and ANG elements, and the United States Property and Fiscal Officers (USPFO), on matters in which there is a substantial *federal interest*.

NGR (AR) 27-19/NGR (AF) 110-6, para. 3 (July 1990) (emphasis added).

In 1992, Bowen, in his capacity as staff judge advocate in the AGR program, was ordered to work on implementation of a military justice system for the Alaska National Guard. Bowen's immediate supervisor on this project was Colonel Jerry W. Gillean, a member of the Alaska National Guard and also a full-time federal employee under the Air National Guard Technician Act, 32 U.S.C. § 709(d). In February, 1993, Colonel Gillean formally notified Bowen that he intended to recommend Bowen's involuntary termination from the Active Guard/

Reserve program to the Alaska Adjutant General. Gillean cited specific instances of misconduct in support of his recommendation that he, Gillean, asserted had breached the trust between Bowen and the leadership of the Alaska National Guard and "further eroded the relationship that should exist" between the Guard leadership and the staff judge advocate. Gillean's recommendation along with Bowen's written response was passed up the chain of command for review in accordance with the procedures outlined for termination of an AGR officer in ANGR 35-03. Ultimately, the recommendation reached the Alaska Adjutant General, Hugh Cox, who reviewed the written recommendations and Bowen's responses. The Adjutant General then approved the recommendation for termination of Bowen from his tour of duty in the AGR program.

B. Nature of the Case and Course of Proceedings Below

Bowen originally filed this suit for damages in the Superior Court (trial court) for the State of Alaska in May of 1995, approximately two years after his termination. The defendants included not only the Alaska National Guard officers who participated in the process leading to his termination (Cox, Dennis, Taylor and Oistead) but also a number of commissioned officers on active duty with the United States Air Force as attorneys in the Judge Advocate General Branch (King, Sigmond, Williams, Pearson and Gamboa). Col. Gillean, an officer in the Alaska National Guard and a federal technician-employee under the National Guard Technician Act, 32

U.S.C. § 709(d), was also named as a defendant. In the complaint Bowen broadly alleged common law torts of defamation, misrepresentation and interference with contract as well as constitutional torts, under both the federal and state constitutions, of denial of equal protection and violation of due process. Bowen also claimed that his superior officers and the State of Alaska breached his employment contract as a staff judge advocate in the AGR program and wrongfully terminated him without just cause. Finally, a civil claim under 18 U.S.C. §§ 1961-1968 (RICO) was asserted.

After appropriate inquiry, Robert C. Bundy, United States Attorney for the District of Alaska, certified that Col. Gillean, as well as the active duty Air Force officers who had also been named as defendants, were employees of the United States acting within the scope of their employment at all times relevant to the events outlined in Bowen's complaint. Pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988, 23 U.S.C. § 2679(d)(1), the United States was then substituted in place of these defendants and by motion made under 28 U.S.C. § 1446(d), the entire case was removed to the Federal District Court for the District of Alaska.

In the federal district court the defendants filed motions to dismiss the complaint under Rule 12(b) of the Federal Rules of Civil Procedure. The Alaska National Guard defendants based their motion on nonjusticiability under *Feres v. United States*, 340 U.S. 135 (1950), and its progeny, failure to exhaust intra-military administrative remedies and the lack of a property interest in employment in an AGR position sufficient to require due process

protection or just cause for termination. The federal status defendants' motion was based primarily on *Feres* immunity.

The district court granted these motions and dismissed the complaint in its entirety. Petitioner's Appendix 16-27. The district court agreed with the Alaska National Guard defendants and the federal status defendants that the *Feres* doctrine, as applied in such cases as *Stauber v. Cline*, 837 F.2d 395 (9th Cir. 1988) and *Mier v. Owens*, 57 F.3d 747 (9th Cir. 1995), immunized these defendants (and their respective military employers) from suit on the claims asserted by Bowen. The district court also concluded that Bowen had failed to state a RICO claim. A judgment was entered dismissing the action. Bowen then filed a notice of appeal.

The Ninth Circuit affirmed the district court's dismissal as to all defendants. Relying on *Feres* and subsequent opinions by this court clarifying the reach of the *Feres* doctrine, the Ninth Circuit held that the *Feres* rule applies not only within the active federal military structure but, with equal force, to the state National Guards and their military members. The Ninth Circuit observed that "the overwhelming weight of authority" supported this holding and that the case law:

> implicitly [recognizes] that the military apparatus of the United States cannot be divided into strictly state and federal components . . . *Feres* applies to the state National Guards and their members due to the integral role they play as part of the nation's defense force and the substantial degree to which the state National Guards are financed, regulated and controlled

> by the federal government even when not called into active federal service.

Petitioner's Appendix 10-11. The decision below then assessed Bowen's claims under the "incident to service" test mandated by *Feres*, 340 U.S. at 146, and had "no trouble concluding that the personnel decisions" that were at the heart of Bowen's complaint and gave rise to his claims were made incident to service. Petitioner's Appendix 11.

Long before filing this lawsuit for damages in the state trial court in May of 1995 Bowen had, promptly after his termination from AGR status, pursued his state administrative remedies by filing an appeal with the Alaska courts. This was not a suit for damages. It was an administrative appeal of the Alaska National Guard's decision to terminate Bowen from AGR status. Petitioner's Appendix 28-31. The central issue was whether Bowen was entitled to a hearing consistent with due process as mandated under state law. *Id.*, at 29. The Alaska Supreme Court ruled that such a pretermination hearing was required and remanded the matter back to the agency for the purposes of conducting such a hearing. *Id.*, at 59. The state court decision did not inquire into the merits of Bowen's factual allegations or authorize a lawsuit remedy. It simply ordered a pretermination hearing consistent with state due process.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS NOT INCONSISTENT WITH THIS COURT'S PRIOR RULINGS OR THE ACTS OF CONGRESS AND IS NOT IN CONFLICT WITH THE RULING OF THE ALASKA SUPREME COURT.

The decision below by the Ninth Circuit Court of Appeals is consistent with all other federal circuit courts of appeal in its application of the doctrine of intra-military immunity to damage[2] suits by members of the National Guard against other guard members or the state National Guard itself. *Wright v. Park*, 5 F.3d 586 (1st Cir. 1993) (action by National Guard technician against Maine Air National Guard officer under federal civil rights law, federal whistleblower statute and state whistleblower law); *Jordan v. National Guard Bureau*, 799 F.2d 99 (3rd Cir. 1986) (damage claim by National Guard technician against federal armed services, state national guard and

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[2] Two of the circuits appear to recognize a limited exception to intra-military immunity-nonjusticiability for equitable claims for injunctive relief, as opposed to claims for damages. *Jordon v. National Guard Bureau*, 799 F.2d 99, 108-111 (3rd Cir. 1986); *Walden v. Bartlett*, 840 F.2d 771, 774-775 (10th Cir. 1988). More recent authority, however, convincingly rejects such an exception to the *Feres* rule. *Watson v. Arkansas National Guard*, 886 F.2d 1004, 1008-1011 (8th Cir. 1989); *Introini v. South Carolina National Guard*, 828 F. Supp. 391, 395 (D.S.C. 1993); *Becker v. Rice*, 827 F. Supp. 589 (W.D. Ark. 1993); *Banks v. United States*, 797 F. Supp. 984, 986 (M.D. Ga. 1992), *aff'd*, 998 F.2d 1023 (11th Cir. 1993); *Williams v. Colorado National Guard*, 821 P.2d 922, 925 (Col. App. 1991); *see also Crawford v. Texas Army National Guard*, 794 F.2d 1034, 1036 (5th Cir. 1986). Bowen has never argued that an injunctive relief exception applies to his complaint and for good reason – it is a claim primarily for damages.

guard officer under federal civil rights statutes and state common law of defamation); *Holdiness v. Stroud*, 808 F.2d 417 (5th Cir. 1987) (action by National Guard technician against his superior officers in the Louisiana Air National Guard under federal civil rights statute, Federal Tort Claims Act and state law); *Knutson v. Wisconsin Air National Guard*, 995 F.2d 765 (7th Cir. 1993) (federal civil rights damage claim by member of Active Guard Reserve Program in Wisconsin Air National Guard against WIANG and State Adjutant General); *Uhl v. Swanstrom*, 79 F.3d 751 (8th Cir. 1996) (damage action by National Guard technician against Iowa Air National Guard, Adjutant General of IANG and his commanding officer in IANG based on federal law and state common law); *Lovell v. Hang*, 890 F.2d 63 (8th Cir. 1989) (damage claim by guardsman in Active Guard Reserve position in Nebraska National Guard against Adjutant General and other NANG officers); *Walden v. Bartlett*, 840 F.2d 771 (10th Cir. 1988) (Colorado Army National Guard technician damage suit against officer of CARNG under federal civil rights statute).

In these cases the circuit courts, like the Ninth Circuit in its decision below, have followed the opinions of this court beginning with the holding in *Feres v. United States*, 340 U.S. 135, 146 (1950), that members of the armed services could not sue the government for injuries that "arise out of or are in the course of activity incident to service." *Feres* involved negligence claims against the United States by, or on behalf of, members of the federal armed services who were injured while on active duty. Subsequent decisions by this court have clarified that the *Feres* rule does not turn on the tortfeasor's military status

but strictly on whether an injury arose out of "an activity incident to [the plaintiff's] military service," *United States v. Johnson*, 481 U.S. 681 (1987) (Feres held to bar claim by Coast Guardsman's estate based on claim of negligence of civilian air traffic controller employed by FAA), that the rule bars constitutional torts as well as common law tort claim, *Chappell v. Wallace*, 462 U.S. 296 (1983), and extends to all activities performed incident to service without reliance on officer/subordinate distinctions, *United States v. Stanley*, 483 U.S. 669 (1987).

In support of the petition Bowen relies heavily on *Perpich v. Department of Defense*, 496 U.S. 334 (1990), for the proposition that the state National Guard and the federal armed services are distinct organizations. The Ninth Circuit, Bowen argues, ignored this distinction and, in applying the *Feres* doctrine to his claims against the state National Guard, violated the constitutional separateness of the two forces. Therefore, as this argument goes, the need and the propriety to granting the petition.

Perpich, however, does not affirm the state National Guard's *independence* from federal regulation even when "the state militia hat is being worn." *Id.*, at 348. To the contrary, while *Perpich* acknowledges the dual enlistment system established by Congress, it reasserts "the supremacy of federal power in the area of military affairs." *Id.*, at 351. The decision below simply applies the same standard of intra-military immunity to damage claims by national guardsmen as that which applies in the federal armed services. Given the federal supremacy in military affairs, the extensive involvement of the federal government in providing the funding, the material and the leadership for state National Guard units, and the critical role these

forces play in the nation's defense, this application of the doctrine of intra-military immunity does not deprive the states of any significant degree of control over the state militia.

As to the Alaska Supreme Court's decision in Bowen's administrative appeal of the Alaska National Guard's decision to terminate him, there may be some conflict in the reasoning between what is articulated in parts of the Alaska court's decision and what can be found in the decision below by the Ninth Circuit, but there is no conflict in the holdings. The Alaska Supreme Court was called upon to make a determination as to whether the administrative process that was afforded to Bowen under ANGR 35-03, as it had been interpreted and implemented in Bowen's termination from his AGR position, needed to comply with due process under state law, i.e., whether an adversarial, pretermination hearing was required. Ultimately, the state court ruled that a pretermination hearing in accordance with state law was required, and was in fact contemplated under ANGR 35-03. The matter was then remanded to the state National Guard for a pretermination hearing of this nature. The state court decision did not authorize or approve a lawsuit for damages by Bowen against the Alaska National Guard or any of its officers and it did not authorize an independent inquiry by the state courts into the merits of Bowen's factual allegations. Under these circumstances there is no conflict on an important federal question between the state court and the court below. *See Cuyler v. Adams*, 449 U.S. 433 (1981); *Katzinger Co. v. Chicago Mfg. Co.*, 329 U.S. 394 (1947).

II. THE DISTRICT COURT AND THE COURT OF APPEALS DID NOT LACK JURISDICTION OVER THE CLAIMS AGAINST THE STATE OF ALASKA AND ITS EMPLOYEES.

The dismissal of the claims against the federal defendants did not extinguish the district court's jurisdiction and require remand to state court as to the state or non-federal defendants. *IMFC Professional Services of Florida, Inc. v. Latin American Home Health, Inc.*, 676 F.2d 152, 158-160 (5th Cir. 1982); *Watkins v. Grover*, 508 F.2d 920, 921 (9th Cir. 1974). Bowen's reliance on *Employees v. Missouri Public Health Department*, 411 U.S. 279 (1973), is misplaced. *Employees v. Missouri Public Health Department* involved the doctrine of sovereign immunity which protects an unconsenting State from a suit initiated in federal courts by its own citizens.

The district court's failure to remand this suit as to the Alaska National Guard and its officers was not an abuse of discretion. The issue to be determined, the application of the *Feres* doctrine of intra-military immunity to the state National Guard, is, as the Ninth Circuit recognized in its decision below, grounded in the essential role the state National Guards play as a part of the nation's defense forces and the extensive degree of federal involvement in financing and affirmatively regulating these units even when they have not been called into active federal service. It was clearly appropriate that this issue be litigated in federal court. In any event, the district court's refusal to remand under a discretionary standard, and the Ninth Circuit's implicit affirmance of the decision, is not a "compelling" basis for granting the petition. United States Supreme Court Rule 10.

III. BOWEN HAS WAIVED THE ARGUMENT THAT THE *FERES* DOCTRINE CANNOT BE APPLIED WITHOUT AFFORDING THE SAME REMEDIES TO THE MILITIA AS ARE AFFORDED MEMBERS OF THE REGULAR MILITARY AND IN ANY CASE THE PETITION SHOULD NOT BE GRANTED ON THIS BASIS.

Bowen did not make an argument to the Ninth Circuit that *Feres* should not extend to the state National Guards because the administrative remedies available to active duty servicemen are broader than those available to members of the state militia. Consequently, he has waived this issue and cannot now present it as a basis for review. There is simply no evidence on this issue and the broad conclusions stated in Bowen's petition on this point are unsupported by the record. It would be inappropriate to grant the petition where these issues and the pertinent facts are undeveloped and speculative.

IV. BOWEN DOES HAVE ADMINISTRATIVE REMEDIES AND IN ANY CASE THE IMPACT OF THE DECISION ON HIM IS NOT COMPELLING REASON TO GRANT THE PETITION.

Although the Ninth Circuit's opinion does preclude Bowen's suit for damages and equitable relief directly against the Alaska National Guard and his superior officers in the Alaska National Guard, he does have an administrative remedy, one that has been confirmed by the Alaska Supreme Court. Petitioner's Appendix 28-59. He has pursued this administrative remedy and obtained an order remanding his termination back to the Alaska

National Guard for purpose of conducting a pretermination hearing that comports with due process under state law. Additionally, Bowen may as well have administrative remedies on the federal military side with the Air Force Board for Correction of Military Records (AFBCMR) under 10 U.S.C. § 1552 and 32 C.F.R. § 865, and the Air Force Discharge Review Board (AFDRB) under 10 U.S.C. § 1553 and 35 C.F.R. § 865.100.

In any case the personal impact on Bowen of the decision below is not a basis for granting this petition.

V. THE INTEGRITY OF THE JUDICIAL PROCESS IS NOT IMPLICATED AND DOES NOT REQUIRE GRANTING THE PETITION.

Petitioner's argument that his petition should be granted in order to insure the integrity of the judicial process in this and similar cases is a mixture of platitudes and broad factual claims. The essence of the argument appears to be that since he was treated unfairly and punished for encouraging compliance with the law by the military, his case should be an exception to the *Feres* rule of intra-military immunity.

Of course, if unfair, retaliatory treatment were a basis for an exception to the *Feres* rule, there would be no rule. The rule would simply disappear as an inquiry would need to be made in every case into the nature of the conduct of the alleged military tortfeasors in order to determine whether the conduct was such that a damage suit was authorized.

Bowen does not cite any authority for the integrity-of-the-system exception he advances. The petition should not be granted on this nebulous basis.

CONCLUSION

The decision by the court below applying the *Feres* bar to Bowen's suit for damages and equitable relief against the Alaska National Guard and its officers is consistent with this court's decisions on intra-military immunity and with the overwhelming weight of authority interpreting those decisions. No compelling reason has been advanced by petitioner for granting the petition. It should be denied.

Respectfully submitted this 22nd day of May 1998.

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